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(1) Supreme Court, U.S.
FILED

No. 09-1456 MAY 28 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 28, 2010

QUESTIONS PRESENTED

1. Whether the Government suppresses evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), either when it refuses to produce notes from an interview with a witness who has exculpatory information, where the defendant knows only the role and identity of the witness but not to what facts the witness would testify; or when it refuses to produce materials in the sole possession of another agency conducting a parallel investigation.

2. Whether, consistent with the civil "loss causation" principles announced in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), a court enhancing a criminal sentence based on the amount of resulting loss must disentangle contributing factors to determine the specific losses actually caused by the defendant's offense conduct.

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John J. Rigas and Timothy J. Rigas respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

This petition raises two issues of recurring significance to criminal proceedings on which courts are deeply divided. In both instances, the Second Circuit ruled for the Government in ways that violate defendants' fundamental rights to be treated fairly and to receive a sentence based on empirically verifiable monetary losses. This case concerns the convictions of two senior officers of Adelphia Communications Corporation ("Adelphia") – Adelphia's former chief executive officer, petitioner John J. Rigas, and its former chief financial officer, petitioner Timothy J. Rigas.

The first issue implicates this Court's landmark approach to Government suppression of exculpatory evidence in *Brady v. Maryland*, 373 U.S. 83 (1963). The Second Circuit in this case deepened existing judicial conflicts by applying two erroneous legal tests in denying petitioners' rights to obtain access to interview notes and materials within the Government's possession. The court below held that the Government may suppress potentially exculpatory evidence when either (1) the defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence," or (2) the evidence is in the sole possession of another federal agency. Pet. App. 31a-32a (internal quotation marks omitted). Both holdings announce legal standards that cannot be squared with *Brady* itself and the decisions of other circuit courts.

This Court also should grant certiorari to review the Second Circuit's judgment affirming that, in calculating a defendant's sentencing range under the Sentencing Guidelines, a district court may ignore unrebutted expert testimony and instead enhance a Guidelines calculation by 26 levels for causing more than $100 million in shareholder losses based only on the sheer "scope" of "the numbers" and the "immediate" – though inconsistent – "press reaction" to certain public disclosures. *Id.* at 44a-45a. That holding implicates this Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). Some circuits have held squarely that *Dura*'s loss-causation standard applies when a district court calculates a defendant's Guidelines range based on the "loss" caused by the defendant's offense conduct. The decision below is inconsistent with the decisions of this Court and other circuit courts, which have required careful causation analysis and evaluation of economic data before imposing such a draconian enhancement.

The combined effect of those two Second Circuit errors is to deprive petitioners John and Timothy Rigas of potentially exculpatory evidence with respect to a key aspect of their convictions for fraud – evidence from Adelphia's outside counsel most knowledgeable about the Securities and Exchange Commission ("SEC") filings with respect to a "co-borrowing" leveraged financing arrangement. After their convictions, the Rigases learned in civil depositions that Adelphia's main outside securities counsel, Carl Rothenberger, made potentially exculpatory statements to the Government about the case just prior to trial. If his Government interviews comported with the exculpatory evidence adduced in his civil deposition testimony about the "co-borrowing" financing facility

on which the fraud counts were based, the Rigases' trial defense would have been augmented dramatically and perhaps dispositively. Press attention about the "co-borrowing" financing arrangement in turn created controversy with Adelphia's outside auditors that led to the Adelphia bankruptcy and subsequent stock price drop on which the 26-point enhancement for the Rigases' sentences was based. Were it not for that enhancement, the Rigases' Guidelines range would have been 33-41 months – a sentence they would have all but served by now. Unless this Court grants review and reverses the Second Circuit's erroneous judgments, John Rigas, now 85 years old, likely will spend the rest of his natural life in a federal correctional institution, and his son, Timothy Rigas, will spend 17 years in prison.

To this day, the Government continues to shroud its evidence in secrecy, refusing to produce it to petitioners or even to disclose it *in camera* to a court. The Government has never rebutted the factual presentation of the loss-causation analysis that conclusively undercuts the harsh sentences imposed on petitioners. Because both issues are cleanly presented and frequently recurring legal questions on which comprehensive circuit conflicts exist, and a judgment from this Court reversing the Second Circuit would provide immediate and substantial relief to petitioners, the petition should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 583 F.3d 108. The opinions and orders of the district court (Pet. App. 34a-48a, 49a-52a) are not reported (but are available at 2008 WL 2544654 and 2008 WL 144824, respectively). A prior opinion of the court of appeals following appeal

of petitioners' convictions (Pet. App. 65a-124a) is reported at 490 F.3d 208.

JURISDICTION

The court of appeals entered judgment on October 5, 2009, and denied a petition for rehearing on December 29, 2009 (Pet. App. 125a-126a). On March 19, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 28, 2010. *See id.* at 158a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

The relevant provision of the United States Sentencing Guidelines Manual (2001) ("USSG"), § 2B1.1, is reproduced at Pet. App. 127a-157a.

STATEMENT

A. Factual Background

In 1952, at the age of 27, John Rigas paid $300 for a cable television franchise in Coudersport, Pennsylvania. For the next 50 years, John devoted his professional life to the company that would become Adelphia, which grew to be one of the nation's largest cable companies, serving millions of subscribers. Each of John's three sons, including Timothy, joined Adelphia as it grew and eventually became a public company (still headquartered in Coudersport) in 1986.

Neither John nor Timothy was an accountant or lawyer. As Adelphia's senior officers, they relied on top professionals, including attorneys from prominent Pittsburgh law firm Buchanan Ingersoll ("Buchanan") and accountants from Deloitte & Touche LLP ("Deloitte"). In particular, Adelphia leaned heavily on Buchanan's Carl Rothenberger, who served as Adelphia's outside corporate and securities counsel.

Under petitioners' management, prior to co-borrowing, Adelphia became a highly leveraged but successful company, taking on billions of dollars in debt as it acquired cable systems and introduced new technology and advanced services. Among other things, the company entered co-borrowing arrangements with private cable companies owned by the Rigas family ("Rigas Managed Entities"). The co-borrowing arrangements, under which Adelphia and the Rigas Managed Entities were jointly and severally liable, were intended to lower borrowing costs and prevent competition for financing among the parties. Rothenberger and other Buchanan lawyers led the drafting and Board presentation of the co-borrowing arrangements, Deloitte advised Adelphia how to account for the co-borrowing, and both Buchanan and Deloitte worked collaboratively with Adelphia to formulate public disclosures about the co-borrowing arrangements. *See* Pet. App. 69a-70a.

On March 27, 2002, Adelphia made three disclosures concerning the company's financials. First, Adelphia issued a press release announcing that its subsidiary, Adelphia Business Solutions, Inc. ("ABS"), was filing for bankruptcy protection.[1] Second, Adelphia issued a separate press release – approved by Adelphia's outside accountants, outside counsel, and audit committee – disclosing approximately $2.2 billion in Rigas Managed Entities co-borrowed debt, which Adelphia believed would be repaid in the ordinary course.[2] *See id.* at 67a & n.2. Although

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[1] *See* CA App. A2291 (Adelphia Business Solutions, Inc. Commences Voluntary Case Under Chapter 11 of the Bankruptcy Code (Mar. 27, 2002)).

[2] *See id.* at A2467 (Adelphia Communications Announces Fourth Quarter and Full Year 2001 Results (Mar. 27, 2002)).

Adelphia had previously disclosed sufficient information for market participants to determine the amount of co borrowed debt,[3] Deloitte determined that Adelphia should expressly disclose the amount in light of new, post-Enron guidance from the SEC concerning disclosure of off-balance-sheet debt.[4] Third, the company disclosed in an analyst conference call that Adelphia had made no progress on the sale of certain "non-strategic" cable systems made up of more than 700,000 subscribers that it previously had announced it would sell.

On the day of the March 27 announcements, the price of Adelphia's stock dropped from $20.39 to $16.70 per share, with more than two hundred million Class A shares of common stock outstanding. Although that was a notable price drop in a single day, most of the cable industry struggled financially in the spring of 2002. Cablevision's stock, for example, plunged 83% from March 26 to July 25, 2002, with no suggestion of fraud.[5]

After the March 27 disclosures, the Government began investigating Adelphia. That investigation occurred in the wake of massive corporate accounting scandals involving Enron and WorldCom, which brought significant attention to the work of outside audit firms for large corporations. Deloitte sought

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[3] *See id.* at A2509-10 (Expert Report of Bruce S. Foerster, Sched. G (Jan. 23, 2007)), A2520-21 (Affidavit of David A. Gulley in Support of Defendants' Sentencing Position ¶ 20 (Feb. 14, 2008) ("Gulley Aff.")).

[4] *See* SEC, Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations, Release Nos. 33-8056 & 34-45321, FR-61 (Jan. 22, 2002), *available at* http://www.sec.gov/rules/other/33-8056.htm.

[5] *See* CA App. A2523, A2548 (Gulley Aff. ¶ 12 & Exh. E).

unsuccessfully to obtain guidance from the SEC on the correct manner of accounting for the co-borrowed debt and then subsequently refused to sign Adelphia's 2001 Form 10-K. Deloitte's failure to support Adelphia's 10-K filing constituted an event of default under Adelphia's bank loans, and, on June 25, 2002, Adelphia filed for bankruptcy. *See* Pet. App. 67a. One month later, the Government arrested petitioners and charged them with bank fraud, securities fraud, wire fraud, and conspiracy. *See id.* at 67a-68a, 71a.

The Government's investigation of Adelphia was expansive. On January 27, 2004, the Government sent petitioners a list of more than 150 people who provided statements to the Government[6] and produced 70 witness statements to the Rigases. The Government's disclosures included individuals of minor significance, many of whom were not even mentioned at petitioners' trial. The Government also produced transcripts of sworn testimony from the SEC investigation of several Deloitte auditors, SEC notes from an interview with an analyst who covered Adelphia, and two SEC correspondence files concerning Adelphia's SEC filings in 1994 and 1995.

Before petitioners' criminal trial, the principal attorney with whom Adelphia had dealt on securities matters for nearly two decades – Buchanan's Rothenberger – repeatedly refused to speak with the Rigases' counsel.[7] Rothenberger told the Rigases' counsel

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[6] *See id.* at A1331-47 (Letter from Margaret Lee, Paralegal Specialist, United States Attorney's Office, to Defense Counsel (Jan. 27, 2004) (enclosing "3500 Materials")).

[7] *See* Pet. App. 174a (Memorandum of Law in Support of John Rigas and Timothy Rigas' Motion To Compel Production of Notes Taken During Government Interviews at 4 (Dec. 4, 2007)

that he also would not talk to Government investigators or lawyers.[8] Rothenberger further represented that, if he were subpoenaed to testify at trial, he would invoke his Fifth Amendment right not to testify.[9]

Notwithstanding those representations, on February 20 and 21, 2004 – two days before petitioners' trial commenced – prosecutor Christopher Clark and U.S. Postal Inspector Thomas Feeney interviewed Rothenberger at the U.S. Attorney's Office. Feeney took notes during the interview. In civil deposition testimony given after the trial, Rothenberger recalled various questions in the interview concerning Rigas stock purchases, SEC filings, and other public disclosures made on behalf of the Rigas family[10] – matters that featured prominently in petitioners' trial and sentencing. In a letter sent to the Rigases on February 24, 2004, however, the Government stated only that Rothenberger "may be able to provide information that is favorable to the defense concerning the timber rights transaction discussed in the Government's Bill of Particulars."[11] The so-called "timber rights transaction" was a very minor aspect of the

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("Motion To Compel")); *id.* at 206a n.5 (Defendants John and Timothy Rigas' Reply Brief in Support of Their Motion To Compel Production of Notes Taken During Government Interviews at 4 n.5 (Jan. 8, 2008) ("Reply on Motion To Compel")); *id.* at 165a (Affidavit of Peter Fleming Jr., Exh. A at 6 (July 3, 2007) ("Fleming Aff.")).

[8] *See id.* at 174a (Motion To Compel at 4).

[9] *See id.*; *see also id.* at 165a (Fleming Aff., Exh. A at 6).

[10] *See id.* at 174a-175a (Motion To Compel at 4 (discussing testimony)).

[11] CA App. A1352 (Letter from David N. Kelley, U.S. Attorney, to All Counsel (Feb. 24, 2004)).

criminal case; Rothenberger did not even mention it in his later depositions. The Government's February 24 letter did not disclose that Rothenberger spoke to the Government, nor did it advise defense counsel what exculpatory information Rothenberger had disclosed. To this day, Feeney's interview notes have never been produced to the Rigases or reviewed *in camera* by a court.

Petitioners' trial commenced on February 23, 2004. Rothenberger did not testify. On July 8, 2004, the jury convicted John and Timothy Rigas of securities fraud, bank fraud, and conspiracy to commit those offenses. The jury acquitted petitioners of wire fraud and conspiracy to commit wire fraud. Judge Sand sentenced John Rigas to 15 years' imprisonment and sentenced Timothy Rigas to 20 years' imprisonment. *See* Pet. App. 3a-4a, 82a. On appeal, the Second Circuit reversed petitioners' convictions on one count of bank fraud and remanded for entry of acquittal on that count and for re-sentencing. *See id.* at 111a-118a, 124a. Meanwhile, the Government rushed to indict petitioners in Pennsylvania for conspiracy. *See United States v. Rigas*, No. 08-3218, 2010 WL 1880366, at *1 (3d Cir. May 12, 2010) ("We conclude that . . . the successive prosecution of the Rigases in this case may constitute a double jeopardy violation.").

B. Proceedings Below

1. After the Second Circuit's remand, petitioners first learned of Feeney's interview notes. In post-trial civil depositions, Rothenberger testified that, contrary to what he told petitioners' counsel before trial, he answered the Government's questions in a pre-trial interview with prosecutor Clark and Postal Inspector Feeney. In the civil deposition, Rothen-

berger offered exculpatory evidence on the very issues about which the Government had questioned him in February 2004, and he consistently indicated that he did not believe that any type of fraud had occurred at Adelphia.[12] Specifically, Rothenberger testified that he did not believe that the amount of Rigas Managed Entities co-borrowed debt needed to be disclosed in SEC filings more specifically than it had been.[13] He also testified that the key discussion with Adelphia concerning disclosure of co-borrowed debt involved someone other than petitioners.[14]

Rothenberger also testified that the SEC interviewed him in December 2004 – after petitioners' trial but before their original sentencing – as part of the SEC's parallel investigation of Adelphia. Rothenberger generally recalled discussing with the SEC transactions in which his firm represented Adelphia, as well as transactions in which his firm represented the Rigases, although he could not recall specific questions the SEC asked.[15] Although a court reporter transcribed the SEC interview, the Government never disclosed to petitioners the transcript or the subject matter of the interview.

Rothenberger's testimony about the public disclosures concerning Adelphia's co-borrowed debt would have been critical to petitioners' liability and punishment. As the legal professional responsible for Adel-

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[12] *See* Pet. App. 182a-192a (Motion To Compel at 10-18 (detailing testimony)).

[13] *See id.* at 183a-188a (Motion To Compel at 11-15).

[14] *See* CA App. A1314-16, A1677 (Deposition Transcript of Carl Rothenberger at 1757-59, 1762).

[15] *See* Pet. App. 175a-176a (Motion To Compel at 5 (discussing testimony)).

phia's public disclosures, Rothenberger's testimony that he believed no fraud had occurred and that petitioners were uninvolved in decisions about disclosing the co-borrowed debt likely would have persuaded the jury that petitioners did not have the requisite *mens rea* to be guilty of securities fraud. Likewise, that testimony would have strongly undermined the Government's claim that petitioners caused the market losses after March 27, which were the single largest factor in the district court's 26-level sentencing enhancement. *See* Pet. App. 44a-45a.

On September 12, 2007, petitioners' counsel met with prosecutors to discuss exculpatory evidence that had come to light in post-trial civil depositions, including Rothenberger's.[16] The Government said the information from Rothenberger was not new, disclosing that the Government had interviewed Rothenberger and other representatives from Buchanan in connection with petitioners' case and that Feeney took notes during Rothenberger's interview.[17]

The Government's position regarding the Rothenberger interview notes changed repeatedly. At the September 12 meeting, Mr. Clark claimed that the Government had produced the interview notes to petitioners' counsel. Shortly thereafter, Assistant U.S. Attorney Bill Johnson represented that the notes either did not exist or had been produced. Finally, on

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[16] Petitioners moved for a new trial on the ground that the Government's principal witness repeatedly contradicted his trial testimony in post-trial civil depositions. The district court denied the motion, and the court of appeals affirmed. *See* Pet. App. 29a-30a.

[17] *See* Letter from Lawrence G. McMichael, Defendants' Counsel, to William A. Johnson, Chief, Securities & Commodities Fraud Task Force, U.S. Dep't of Justice (Sept. 13, 2007).

September 21, 2007, Mr. Johnson admitted that the notes existed, had not been produced, and would not be.[18]

On October 15, 2007, petitioners specifically asked the Government to disclose whether the Department of Justice or the SEC possessed materials reflecting other interviews with (1) Rothenberger, (2) any other Buchanan attorneys, (3) James Brown, the Government's principal witness, (4) representatives of certain third parties implicated in petitioners' trial, or (5) any lenders or investment bankers involved in Adelphia's transactions.[19] The Government refused to confirm or deny the existence of any such information.

Petitioners moved to compel the Rothenberger interview notes and any other undisclosed exculpatory evidence. The Government opposed, claiming that it need not disclose potentially exculpatory materials "when the defendant is aware of the identity of the witness" providing the material or when the materials are in the sole possession of an agency conducting its own, parallel investigation.[20]

In January 2008, the district court upheld both of the Government's arguments. First, the court held

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[18] *See* Pet. App. 219a-220a (Letter from Lawrence G. McMichael, Defendants' Counsel, to Hon. Preet Bharara, U.S. Attorney 2-3 (Sept. 1, 2009)).

[19] *See* CA App. A1354-55 (Letter from Lawrence G. McMichael, Defendants' Counsel, to William F. Johnson, Chief, Securities & Commodities Fraud Task Force, U.S. Dep't of Justice 1-2 (Oct. 15, 2007)).

[20] *See id.* at A1421-23, A1427-29 (Government's Memorandum of Law in Opposition to the Defendants' Motion To Compel Production of Notes Taken During Government Interviews at 1-3, 7-9 (Dec. 26, 2007) ("Opp. to Motion To Compel")).

that "*Brady* does not require the government to turn over exculpatory evidence if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence," finding that petitioners were "[]aware of these witnesses' identities" and "knew of Rothenberger's existence, his role at Adelphia, and the facts on which he could testi[f]y." Pet. App. 50a, 51a-52a (internal quotation marks omitted).[21] Second, the court held that "there was no joint investigation with the SEC, and the United States Attorney's Office cannot be obligated to produce documents in the custody of the SEC." *Id.* at 52a.

2. In February 2008, petitioners submitted their re sentencing memorandum in the district court.[22] Petitioners proffered the expert opinion of economist Dr. David Gulley, who testified that multiple factors likely caused Adelphia's downfall, that only a *de minimis* amount of the company's losses may have been attributable to the securities fraud offenses for which the Rigases were convicted, and that "no loss to securities holders, caused specifically by the securities fraud crime for which the Defendants were convicted, has been reliably estimated in this case to date."[23] The Government presented no expert testimony of its own; nor did it impeach or discredit Dr. Gulley. Instead, the Government estimated the total loss suffered by Adelphia shareholders at above $100 million, and then relied on hand-picked analyst

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[21] The court cited no evidence that petitioners "knew . . . the facts on which [Rothenberger] could testi[f]y." Pet. App. 51a.

[22] *See* CA App. A1556-70 (Resentencing Memorandum of John Rigas and Timothy Rigas at 60-74 (Feb. 18, 2008)).

[23] *See id.* at A2514-15, A2524-25 (Gulley Aff. ¶¶ 7, 33).

reports to attribute at least $100 million of that loss to petitioners.[24]

The district court accepted the Government's position. Despite the "other loss factors" identified by petitioners, the court held that "the numbers here are of such scope, the immediate press reaction to the disclosure of over two billion dollars in undisclosed debt so compelling that the claim that there was not a reasonable calculation of a loss of at least $100 million borders on the frivolous and is not made any less meritless because it is the subject of 'expert' analysis." Pet. App. 44a-45a. The court applied the 26-level enhancement for causing such losses, sentencing John Rigas to a 12-year sentence, and Timothy Rigas to a 17-year sentence. *See id.* at 47a.

3. On appeal, the Second Circuit affirmed the denial of petitioners' Motion To Compel and the revised sentences imposed by the district court.

The court could "detect no error" in the district court's denial of the Motion To Compel. Pet. App. 32a. First, the court affirmed that "'[n]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.'" *Id.* at 31a (quoting *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987)). The court held that "*Brady* did not compel disclosure of the government's interview notes with Rothenberger" because "defendants knew of Rothenberger's role at Adelphia and the facts

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[24] *See* CA App. A2704-25 (Government's Re-Sentencing Memorandum at 11-32 (Mar. 18, 2008)).

about which he could testify." *Id.*[25] Second, the court affirmed that "the United States Attorney's Office was not in possession of notes from SEC interviews with Rothenberger or other witnesses, and did not have an obligation to disclose what they did not possess." *Id.* at 32a.

The Second Circuit also affirmed the district court's 26-level enhancement for loss causation. *See id.* at 18a-20a. Like the district court, the court of appeals ignored petitioners' expert evidence that multiple factors contributed to Adelphia's downfall. Relying on a sentencing court's freedom to "only make a reasonable estimate of the loss," USSG § 2B1.1 cmt. n.2(C) (2001), the court held that, "regardless of the precise amount of the loss attributable to the Rigases' fraud, that figure easily exceeds $100 million." Pet. App. 19a. The court also justified the enhancement based on statements in its prior appellate decision regarding petitioners' purported "looting" of more than $200 million from Adelphia. *Id.* at 80a; *see id.* at 19a.

[25] Like the district court, the court of appeals cited no evidence supporting petitioners' purported knowledge of "the facts about which [Rothenberger] could testify." Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S ANALYSIS OF *BRADY* SUPPRESSION WAS ERRONEOUS AND IN CONFLICT WITH OTHER CIRCUITS

A. Federal And State Courts Disagree About What Constitutes "Suppression" Under *Brady*

The Second Circuit's decision in this case implicates a three-way split among the federal courts of appeals and state supreme courts concerning when a defendant's knowledge permits the Government to suppress exculpatory evidence, particularly witness statements. The judgment below likewise deepens an existing conflict regarding the Government's obligation to disclose evidence held by another federal agency.

1. Scope of defendants' knowledge

a. In the Second Circuit, "'[n]o *Brady* violation occurs if the defendant knew or *should have known* the essential facts permitting him to take advantage of any exculpatory evidence.'" Pet. App. 31a (quoting *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987)) (emphasis added). The First, Fifth, and Sixth Circuits apply that same, far-reaching standard. *See, e.g.*, *United States v. Skilling*, 554 F.3d 529, 575 (5th Cir.), *cert. granted*, 130 S. Ct. 393 (2009); *Owens v. Guida*, 549 F.3d 399, 415 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 281 (2009); *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc).

b. The Third, Fourth, Seventh, Eighth, and Eleventh Circuits do not reconstruct what a defendant "should have known," but look instead to what he could have ascertained through the exercise of

"reasonable diligence." *See, e.g.*, *Ferguson v. Secretary for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009), *petition for cert. pending*, No. 09-1186 (filed Mar. 31, 2010); *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1544 (2010); *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008); *United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005); *Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2002). Numerous state supreme courts also apply the "reasonable diligence" standard.[26]

Although the "should have known" and "reasonable diligence" standards may operate similarly in some cases, their difference is pronounced in cases, like this one, where the exculpatory evidence is "contained in a witness's head," rather than a document. *Compare Boss v. Pierce*, 263 F.3d 734, 740-41 (7th Cir. 2001) (finding suppression of defense witness statements, despite defense counsel's access to witness, because "it is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses," particularly when the witness is "uncooperative or reluctant"), *with United States v. Schledwitz*, Nos. 95-5309 *et al.*, 1995 WL 712755, at *5 (6th Cir. Dec. 4, 1995) (applying "should have known" standard and concluding that, because witness "was well known to be friendly and available as a witness" and had been interviewed by defense counsel before trial, "defendant should have been aware of [witness's] opinions").

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[26] *See, e.g.*, *Jones v. State*, 709 So. 2d 512, 519 (Fla. 1998); *Waldrip v. Head*, 620 S.E.2d 829, 832 (Ga. 2005); *Ware v. State*, 702 A.2d 699, 708 (Md. 1997), *State v. Goulet*, 593 N.W.2d 345, 349 (N.D. 1999).

c. The third standard for *Brady* suppression – and the one most consistent with this Court's precedents – is applied by the Ninth Circuit, where only a defendant's actual knowledge or awareness of the exculpatory evidence justifies the Government's suppression of it. *See Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006); *see also Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1091 (9th Cir. 2008) (finding *Brady* suppression "[e]ven if [appellee] had heard that [witness] had information about the murder," because that "knowledge is not the same as [witness]'s extensive statements to the police"). At least one state supreme court applies a similar "awareness" standard. *See State v. Steele*, 510 N.W.2d 661, 665 (S.D. 1994) ("'[W]here [the defendant] was not aware of the evidence, if the evidence is both favorable and material, and he has made a request for the evidence, there has been a due process violation.'") (quoting *Ashker v. Solem*, 457 N.W.2d 473, 477 (S.D. 1990)) (alteration in original).

The Tenth Circuit sometimes applies a knowledge standard for *Brady* suppression. *See Scott v. Mullin*, 303 F.3d 1222, 1229-30 (10th Cir. 2002). At other times, the Tenth Circuit seems to apply a different, somewhat ambiguous standard. *See Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("the fact that defense counsel 'knew or should have known' about the [exculpatory] information . . . is irrelevant to whether the prosecution had an obligation to disclose the information," but "will bear on whether there has been a *Brady* violation")

The disagreement among federal and state courts regarding the legal standard for evaluating *Brady* suppression has significant consequences in cases involving witness statements. Countless federal and

state courts evaluating facts very similar to those here disagree with the Second Circuit regarding whether a defendant's knowledge of the identity and role of a potential witness excuses the Government's failure to produce notes from an interview with the witness.[27] Given the disagreement regarding the proper legal standard and how it applies in similar circumstances, this Court should review the three-

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[27] *See, e.g.*, *Tennison*, 570 F.3d at 1091 (finding suppression of witness statement "[e]ven if [appellee] had heard that [witness interviewed by police] had information about the murder," because that "knowledge is not the same as [witness]'s extensive statements to the police," and the witness "was unwilling to become involved" in the case when "informally asked" by appellee); *Benn v. Lambert*, 283 F.3d 1040, 1062 (9th Cir. 2002) (finding suppression of expert's exculpatory opinion, even though defendant "knew of the experts' existence," because defendant "had been supplied with evidence by the state that the experts' view supported the state's theory" and was "not required to assume that the state has concealed material information"); *Boss*, 263 F.3d at 740 ("defense counsel [did not have] access to Brady material contained in a witness's head," even though the witness was a defense witness); *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997) (finding suppression of interview notes regarding expert's exculpatory opinion, even though defendant knew of and had ability to interview expert and obtain undisclosed material); *Wilson v. State*, 874 So. 2d 1131, 1133-34, 1143 (Ala. Crim. App. 2002) (finding suppression of detective's "case notes" containing "witness statements," even though police report separately identified witnesses, "because [defendant] did not know the substance of their testimony" and therefore "had no reason to expend the time or resources to locate them"), *rev'd on other grounds*, 874 So. 2d 1145, 1150 (Ala. 2003) (affirming suppression, but finding lack of prejudice); *Chauncey v. State*, 127 P.3d 18, 20, 25 (Wyo. 2006) (finding suppression of interview notes, even though witness "knew" and was "living with the appellant," because "no authority . . . suggest[s] that the content of a witness' interview with law enforcement officers is equally available to a defendant when the defendant is acquainted with that witness").

way split among federal and state courts over the scope of a defendant's knowledge that may excuse the Government's suppression of evidence.

*2. **Evidence possessed by another agency***

The Second Circuit's judgment that the Government need not disclose exculpatory evidence in the sole possession of another agency also conflicts with other circuits' judgments. Unlike the Second Circuit below, most circuits reject a possession standard altogether, holding that "[t]here is no question that the government's duty to disclose under *Brady* reaches beyond evidence in the prosecutor's actual possession." *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006); *accord United States v. Price*, 566 F.3d 900, 910 (9th Cir. 2009); *Breedlove v. Moore*, 279 F.3d 952, 961 (11th Cir. 2002). The circuits nevertheless disagree about the circumstances under which a prosecutor must disclose exculpatory evidence in the sole possession of another agency.

In the Seventh, Ninth, and D.C. Circuits, "if a government agency is charged with the administration of a statute and has consulted with the prosecution in the case, the agency will be considered part of the prosecution, and its knowledge of *Brady* material will be imputed to the prosecution." *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999); *accord United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992). Applying that test recently, the Ninth Circuit held that, where the SEC had investigated civil securities fraud related to the criminal securities fraud, the prosecution "is charged with knowledge of the parallel SEC investigation." *United States v. Reyes*, 577 F.3d 1069, 1078 (9th Cir. 2009). Tellingly, in arguing *against* disclosure of SEC mate-

rials in this case, that is *exactly* how the Government characterized the SEC's investigation of Adelphia.[28]

In contrast, the Second, Third, and Eleventh Circuits typically focus on whether the agency or official in possession of the evidence was part of the "prosecution team." *See, e.g.*, *Pelullo*, 399 F.3d at 216, 218; *United States v. Gil*, 297 F.3d 93, 106 (2d Cir. 2002); *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (defining the "prosecution team" as "the prosecutor or anyone over whom he has authority") (internal quotation marks omitted). As both courts and commentators have noted, the "prosecution team" test not only is different from that applied in other circuits, but also is applied inconsistently, as exemplified by the Second Circuit's decision below. *See also United States v. Zagari*, 111 F.3d 307, 320 n.13 (2d Cir. 1997) ("The extent to which knowledge may be imputed from one federal investigative agency to another for *Brady* purposes is as yet unclear."); Audrey Strauss, *"Brady" Obligation Extends Beyond Prosecutor's Office*, 242 N.Y.L.J. 5, 7 (Nov. 5, 2009) (contrasting Second Circuit's "prosecution team" test with Judge Sand's "very brief[]" analysis of the issue in this case and Second Circuit's affirmance "essentially without discussion").[29]

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[28] *See* Gov't CA Br. at 134 (Nov. 19, 2008) ("*the SEC conducted a parallel civil enforcement investigation* with respect to Adelphia") (emphasis added).

[29] Judge Sand has elsewhere admitted that, under the Second Circuit's test, the "exact point" at which a prosecutor is required "to seek out any exculpatory or impeachment evidence" in the possession of another agency is "uncertain." *Chandras v. McGinnis*, No. 01 Civ. 2519 (LBS), 2002 WL 31946711, at *7 (S.D.N.Y. Nov. 13, 2002).

B. The Judgment Below Was Erroneous

The Second Circuit held that, regardless of whether the Rothenberger interview notes were exculpatory, they were not suppressed under *Brady* because "defendants knew of Rothenberger's role at Adelphia and the facts about which he could testify." Pet. App. 31a; *see id.* at 51a. That holding is inconsistent with this Court's precedents and rests on a plainly erroneous factual basis. The Second Circuit also erroneously held that the Government may suppress potentially exculpatory evidence in the sole possession of an agency conducting a parallel investigation.

1. The judgment below is inconsistent with this Court's precedents, which "suggest[] a focus on actual knowledge as the key consideration in determining whether evidence is available to the defense for *Brady* purposes." *Boss*, 263 F.3d at 743; *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that *Brady* applies to information known to the prosecution but "unknown to the defense"); *United States v. Agurs*, 427 U.S. 97, 103 (1976) (same). Indeed, in *Brady* itself, when Brady admitted participating in the crime with Boblit, but claimed "that Boblit did the actual killing," this Court held that suppression of Boblit's confession violated the Due Process Clause. *Brady*, 373 U.S. at 84. Under the Second Circuit's "should have known" standard, no suppression could have occurred in *Brady* because Brady knew the identity of Boblit and his role in the underlying events and therefore "should have known" the exculpatory evidence he could provide.

Moreover, in the analogous context of evaluating whether *habeas corpus* petitioners have "cause" for failing to raise *Brady* claims in earlier proceedings, this Court has rejected arguments that a defendant

should have known about exculpatory interview notes because the defendant knew the identity of witnesses interviewed by police. *See Strickler v. Greene*, 527 U.S. 263, 285 (1999) (holding that defense counsel's knowledge of multiple police interviews did not mean that counsel "would have known that records pertaining to those interviews . . . existed and had been suppressed"); *id.* at 285 n.27 (excusing defense's failure to discover notes from witness "because she refused to speak with defense counsel before trial").

A "should have known" standard improperly limits the Government's *Brady* obligations. Such a standard permits the Government to ignore specific *Brady* requests when it believes – and a reviewing court later agrees – that the defendant "should have known" about the evidence on his own. But, "'in the often competitive enterprise of ferreting out crime,'" prosecutors "simply cannot be asked to maintain the requisite neutrality with regard to their own investigations." *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971) (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). What is obvious to the Government may be tenuous to a defendant, and reviewing courts are left to make post hoc evaluations of how a defendant should have put various pieces together – an inquiry plagued with hindsight bias and indeterminacy.

In addition, a "should have known" standard gives the Government an incentive to play "hide and seek" with exculpatory evidence. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). If the Government withholds exculpatory evidence because it believes that the defense

should find it elsewhere, then the Government will be exempt from its *Brady* obligations, even if the defendant fails to find the evidence. On the other hand, if the Government's belief that a defendant should find exculpatory evidence on his own is incorrect – that is, the evidence cannot reasonably be found elsewhere – then the Government is able to violate *Brady* with impunity, because no one will discover the suppressed evidence.

2. The judgment below also rests on a plainly erroneous factual basis. Although petitioners knew Rothenberger's identity and "role" as outside counsel to Adelphia, the lower courts erred in finding that petitioners "knew . . . the facts about which he could testify." Pet. App. 31a. Neither court cited any record evidence supporting that claim; nor did the Government. In fact, the Government did not even *argue* that petitioners knew the facts about which Rothenberger could testify. Rather, the Government asserted in the district court that it satisfied its *Brady* obligations because it disclosed the so-called "timber rights transaction" and because petitioners "were well aware of the significance of Carl Rothenberger and took no action to procure his testimony."[30] Likewise, the Government asserted in the Second Circuit that "[*Brady*] suppression could not have happened" because of "[petitioners'] firsthand knowledge of [Rothenberger's] role" in the "underlying events."[31]

Moreover, Rothenberger thwarted petitioners' efforts to learn the facts about which he could testify.

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[30] CA App. A1425 (Opp. to Motion To Compel at 5); *see id.* at A1423 (Opp to Motion To Compel at 3).

[31] Gov't CA Br. at 122.

When petitioners' attorneys attempted to speak with Rothenberger, his counsel told them he would not speak with petitioners' counsel or the Government, and that, if subpoenaed, he would invoke his Fifth Amendment right not to testify.[32] Indeed, even when the Government disclosed that Rothenberger had favorable information about the timber rights transaction, it failed to disclose – and petitioners could not have known – that Rothenberger spoke with the Government just two days before trial.[33] Thus, both lower courts committed plain error in finding that petitioners knew the facts about which Rothenberger could and would testify.[34]

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[32] *See supra* notes 7-9.

[33] Despite producing more than 70 witness statements and SEC materials, the Government failed to disclose its interview with Rothenberger, failed to produce the interview notes, disclosed only that he might possess information about an immaterial "timber rights transaction" without revealing whether that evidence stemmed from documentary or testimonial evidence, and failed to disclose potentially exculpatory evidence possessed by the SEC. Thus, even if petitioners could have had some knowledge of the topics about which Rothenberger might testify, the Government's misleading disclosures effectively nullified any such knowledge. *See, e.g.*, *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995) ("[a] defendant receiving such documents from the government could reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents pertaining to [witness]"); *Pelullo*, 399 F.3d at 213; *Lambert*, 283 F.3d at 1062; *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986); *Hughes v. Hopper*, 629 F.2d 1036, 1039 (5th Cir. 1980).

[34] After trial, petitioners learned that the Government failed to disclose interview notes from other witnesses with potentially exculpatory information. Petitioners indisputably did not know the essential facts of those witnesses' testimony. Although this did not feature prominently in petitioners' Second Circuit briefs, the Government devoted two pages of its brief to discuss "notes

3. Finally, the judgment below erroneously held that no *Brady* suppression occurred because prosecutors were "not in possession of notes from SEC interviews with Rothenberger or other witnesses, and did not have an obligation to disclose what they did not possess." Pet. App. 32a.

This Court has rejected a "possession" standard and instead imposed on prosecutors "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437; *see Agurs*, 427 U.S. at 103 (requiring disclosure of exculpatory evidence that "the prosecution knew, or should have known," existed). Moreover, in *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), this Court "appears to have assumed extension of the [*Brady*] rule to unsearched files" of a state protective service agency. *Brooks*, 966 F.2d at 1502; *accord Zagari*, 111 F.3d at 320 n.13. Thus, the Second Circuit's decision in this case cannot be reconciled with this Court's *Brady* precedents.

C. This Case Is An Ideal Vehicle For Addressing These Important And Recurring Questions

The Second Circuit's judgment clearly rested on legal standards that are in conflict. The court's conclusion that the Government did not suppress evidence for *Brady* purposes is the only basis for the judgment below denying petitioners' motion to compel. Neither the district court nor the Second Circuit evaluated whether the evidence sought was

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of any Government interviews of other witnesses." Gov't CA Br. at 130-31. Should the Court grant the petition, it should consider this issue in addition to the Rothenberger notes.

exculpatory or material. Indeed, no one but the Government has ever even seen the notes. Only the suppression questions that have divided federal and state courts therefore are at issue here.

Those questions are important in this case. The available evidence suggests that the witness statements suppressed by the Government contain exculpatory information critical to petitioners' liability and sentencing. For example, Rothenberger testified in post-trial civil depositions that Buchanan lawyers reviewed and approved the public disclosures regarding Adelphia's co-borrowed debt, that petitioners were not involved in that process, and that, in any event, the disclosures were not fraudulent.[35] That testimony not only significantly undermines petitioners' convictions, but also undercuts the district court's 26-level enhancement for loss causation, which was based on petitioners' presumed involvement in fraudulent disclosures concerning co-borrowed debt.

Moreover, the *Brady* issues here recur in countless cases across the country. Numerous federal and state courts have encountered the question of Government suppression of witness statements in closely analogous circumstances.[36] Likewise, "[f]ederal prosecutors *often* take the position" they did here – namely, "that the 'government's' obligation to disclose potentially exculpatory information in 'its' possession extends to the prosecutors' own files but not the files of other agencies such as the [SEC]."[37] This case presents the Court with a unique opportunity to resolve both important questions regarding *Brady* suppression.

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[35] *See supra* notes 12-14.

[36] *See supra* note 28.

[37] Strauss, 242 N.Y.L.J. at 5 (emphasis added).

II. THE SECOND CIRCUIT'S ERRONEOUS METHOD OF DETERMINING THE SENTENCING GUIDELINES' ENHANCEMENT FOR LOSS CAUSATION CONFLICTS WITH OTHER CIRCUITS' APPROACHES

A. The Circuits Are Divided In Applying *Dura Pharmaceuticals*' Causation Principles To Criminal Sentencing

In *Dura Pharmaceuticals*, this Court unanimously held that courts evaluating civil securities fraud must "[un]tangle" the many "factors affecting price," including "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." 544 U.S. at 343. Although this Court has not yet applied *Dura*'s "loss causation" principles to criminal sentencing enhancements, the Second and Fifth Circuits have done so. *See United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007) (rejecting government's contention that "the principles set forth in *Dura Pharmaceuticals*, a civil case, should not apply to loss calculation in a criminal case"); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005) (same).

In *Olis*, for example, the Fifth Circuit looked to the law of civil loss causation "both because it furnishes the standard of compensable injury for securities fraud victims and because it is attuned to stock market complexities." 429 F.3d at 546. Emphasizing the need for "careful analysis" that is "grounded in economic reality," the court rejected "the Government's use of stock prices the day before and the day after the revelation of the fraud" because it "did not account either for the actual price at which most holders purchased the company's shares, or for the influence of outside factors on the change in price."

Id. at 547. The Fifth Circuit also criticized the district court for "refus[ing] to consider" expert testimony that "explored numerous forces at work on the [company's] stock price during the relevant periods." *Id.* at 548.

In direct and explicit conflict with *Olis* and *Rutkoske*, the Ninth Circuit recently "decline[d]" to "follow the Second Circuit in expressly applying *Dura Pharmaceuticals's* civil principle to criminal securities fraud sentencing." *United States v. Berger*, 587 F.3d 1038, 1042-43 (9th Cir. 2009). In *Berger*, the Ninth Circuit endorsed the "broader rule" that a defendant's sentence "be based on all harm that resulted from the acts or omissions of the defendant." *Id.* at 1045 (internal quotation marks omitted). Similarly, in the decision below, the Second Circuit significantly weakened its holding in *Rutkoske* – which it failed to cite, much less distinguish – by allowing the Sentencing Guidelines' "reasonable estimate of the loss" provision to trump *Dura*'s loss-causation principles. As a result, the court of appeals "ha[d] no trouble affirming the District Court's estimate of loss," Pet. App. 20a, which was based on the "scope" of "the numbers" and the "compelling" and "immediate press reaction," *id.* at 44a-45a, rather than petitioners' unrebutted expert testimony.

Thus, with respect to loss causation in securities fraud cases, the Fifth Circuit unequivocally applies *Dura*, the Ninth Circuit unequivocally rejects *Dura*'s approach, and the Second Circuit has now waffled on whether *Dura* applies. This conflict has been noted by courts and commentators alike. *See, e.g.*, *Berger*, *supra*; Alan R. Friedman & Theodore S. Hertzberg, *Possible Circuit Split in Calculating Loss Under Sentencing Guidelines*, 243 N.Y.L.J. 4, 4 (Jan. 15, 2010)

(noting that *Berger* "diverged from the Second and Fifth Circuits").

In the closely analogous context of insider-trading prosecutions, the Eighth and Tenth Circuits have also divided on the question whether *Dura*'s loss-causation principles apply to criminal sentencing enhancements. The disagreement in those circuits concerns sentencing enhancements based on the gain achieved by a defendant convicted of insider trading. *Compare United States v. Nacchio*, 573 F.3d 1062, 1074 (10th Cir. 2009) (applying *Dura*'s loss-causation principles to "arriv[e] at a figure that approximates the gain specifically resulting from [defendant]'s offense") (citing *Dura*), *with United States v. Mooney*, 425 F.3d 1093, 1100 & n.6 (8th Cir. 2005) (en banc) (rejecting reliance on *Dura*); *see also* Friedman & Hertzberg, *supra* (describing conflict). That division among the Second, Fifth, Eighth, Ninth, and Tenth Circuits is sufficiently entrenched that this Court should resolve whether *Dura*'s loss-causation approach applies in the criminal sentencing context.

B. The Second Circuit Erroneously Enhanced Petitioners' Sentences For Causing More Than $100 Million In Losses

1. The courts below failed to identify petitioners' offense conduct and refused to evaluate economic evidence of loss causation, instead assuming that petitioners must have caused at least $100 million of Adelphia's market losses over a three-month period. That ruling is inconsistent with *Dura*.

Neither court below identified petitioners' offense conduct that allegedly caused massive shareholder losses. The indictment charged four separate ways

that petitioners could be guilty of securities fraud,[38] and the Government presented numerous theories at trial. The jury's verdict did not delineate the specific conduct that supported the conviction.[39] Thus, without a finding by the district court regarding the criminal conduct that the jury specifically attributed to petitioners, it is impossible to establish a causal link between petitioners' conduct and losses to Adelphia's shareholders. For example, if petitioners' fraud convictions involved misrepresenting the number of Adelphia subscribers, the impact of that fraud on share price likely was negligible.

More importantly, petitioners' unrebutted expert testimony established that numerous events contributed to the losses that Adelphia's shareholders experienced in the three months after the March 27 disclosures. Those causes include the announcement of ABS's bankruptcy,[40] Adelphia's failure to complete an anticipated sale of some portions of its cable system,[41] Deloitte's refusal to sign Adelphia's Form 10-K (which led to default and acceleration of Adelphia's debt), and the cable industry's general market decline in the spring of 2002.[42] In short, the Government developed and the courts below cited no record evidence explicating the amount of loss actually caused by petitioners; the only evidence focused on

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[38] *See* CA App. A115-16 (Superseding Indictment ¶ 63 (Aug. 5, 2003)).

[39] *See* Appellants Supp. CA App. 126 (Special Verdict Form (July 15, 2004)).

[40] *See supra* note 1.

[41] *See* CA App. A2519 (Gulley Aff. ¶ 17).

[42] *See id.* at A2523, A2548 (Gulley Aff. ¶ 26 & Exh. E); *supra* pp. 6-7.

the total losses suffered by Adelphia shareholders after numerous events occurred over a three-month period.[43]

2. Both courts below relied on commentary to the Sentencing Guidelines indicating that a sentencing court "'need only make a reasonable estimate of the loss.'" Pet. App. 19a (quoting USSG § 2B1.1 cmt. n.2(C)); *see id.* at 43a. However, estimating the *amount* of the loss is entirely different from presuming that a defendant's putative criminal conduct caused the loss. Here, neither court identified any evidence of causation between petitioners' conduct and losses to Adelphia shareholders.

The district court asserted that "the immediate press reaction to the disclosure of over two billion dollars in undisclosed debt" was "so compelling" that it must have been attributable to petitioners' conduct. *Id.* at 44a-45a. But that conclusion – presumably based on the Government's incomplete sampling of analyst reports – ignored substantial contrary evidence. First, the court overlooked that two other events were disclosed the same day as Adelphia's co-borrowing – ABS's bankruptcy and Adelphia's failure to sell more than 700,000 non-strategic subscribers. Neither event pertained to the Rigases' offense conduct. Second, the court ignored that sufficient public information existed before March 27, 2002, for the market to have judged the extent of co-borrowing. Third, the court disregarded Dr. Gulley's conclusion that Adelphia's stock price was not inflated before March 27, 2002, which suggests that the March 27 disclosures did not correct

[43] *See* CA App. A2524 (Gulley Aff. ¶ 33).

any alleged misinformation in the marketplace.[44] Fourth, the district court failed to exclude losses by investors who originally bought their Adelphia shares before any offensive conduct could have occurred. And, fifth, the district court ignored *contrary* "immediate press reaction" to the March 27 disclosures, such as analysts who "believe[d] that the concerns are exaggerated" and "reaction was way overdone."[45]

Because the Second Circuit chose to disregard *Dura*'s more stringent evidentiary approach to loss causation in this case, it "ha[d] no trouble affirming the District Court's estimate of loss caused by the Rigases' fraud," because it also ignored the substantial evidence rebutting the linkage between the Rigases' conduct and losses sustained by Adelphia shareholders. Pet. App. 20a. The court of appeals did, however, add its own, new justification for attributing more than $100 million of losses to petitioners – that petitioners took $200 million dollars from Adelphia's Cash Management System "'to pay off Rigas family margin loans.'" *Id.* (quoting *id.* at 80a). Even aside from the fact that the district court did not mention that alternative basis, any argument that losses associated with looting claims were caused by the securities and bank fraud offenses for which the Rigases were convicted is unsustainable. The disclosure of alleged looting occurred well after the March 27, 2002 co-borrowing disclosure and thus came too late to have caused the stock-price decline on which the district court's loss-causation analysis

[44] *See id.* at A2521-24 (Gulley Aff. ¶¶ 23-29).

[45] *See, e.g.*, *id.* at A2859-60 (Saloman Smith Barney, Addressing Off Balance Sheet Debt Concerns (Mar. 27, 2002)); *id.* at A2862 (Bank of America Securities, Putting ADLAC's Disclosure in Perspective (Mar. 28, 2002)).

focused. This case thus implicates the criticism noted by courts in similar cases of the draconian effect on corporate officers' criminal sentences of measuring shareholder losses based on "paper losses in the company's value, which have no correlation with losses to actual shareholders who bought or sold based on fraudulent information." *Olis*, 429 F.3d at 547.

C. This Case Is An Ideal Vehicle To Determine The Standard For Loss Causation In Federal Criminal Sentences

This case presents a good opportunity for the Court to resolve the conflict among the circuits regarding the applicability of *Dura*'s civil loss-causation principles to criminal sentencing enhancements. The district court's enhancement for loss causation was the primary reason that petitioners are serving such long sentences – John, 12 years, and Timothy, 17 years. Without the 26-level enhancement for causing more than $100 million in losses, petitioners' Guidelines range would have been 33-41 months; as of the filing of this petition, they already have served 33 months in prison. Notwithstanding the importance of loss causation to petitioners' sentences and the centrality of that issue in their Second Circuit brief, the Second Circuit gave the issue short shrift, ignoring both *Dura* and petitioners' unrebutted expert testimony regarding loss causation.

Petitioners' experience is common – "a court's method for calculating loss is often critical in calculating the guidelines sentence in a securities fraud case." Friedman & Hertzberg, 243 N.Y.L.J. at 4. As Friedman and Hertzberg explain:

> Unlike certain other guidelines that have a high base offense level and authorize small increases

> based on specific offense characteristics, § 2B1.1 starts off at a relatively low offense level of six but then prescribes up to 30 levels of increases depending on the magnitude of loss. To put that dynamic into proper perspective, a 30-level enhancement can turn a guidelines sentence from home detention into more than 20 years in prison.

Id.

The issue of loss causation in criminal sentencing is even more important than in civil securities fraud, which warranted this Court's consideration in *Dura*. As Judge Bye argued in dissenting from the Eighth Circuit's refusal to apply *Dura* to sentencing enhancements: "The terms gain and loss are ordinary words with meanings that are similar whether they are used in a civil or a criminal context. If those [losses] are not a causative factor in a civil fraud or deception case, that obvious concept should not apply in the criminal case, where the stakes for a defendant relate not to money but to freedom from incarceration." *Mooney*, 425 F.3d at 1108.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 28, 2010

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 08-3485-cr(L), 08-3500-cr(CON),
08-3592-cr(CON), 08-3597-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants-Appellants.

Argued: May 5, 2009

Decided: Oct. 5, 2009

Before: FEINBERG, WINTER, and CABRANES, Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge:

We consider several challenges to the trial and sentencing of John J. Rigas, the former CEO of Adelphia Communications Corp. ("Adelphia"), and his son Timothy J. Rigas, Adelphia's former CFO (together, the "Rigases"), including the Rigases' claims that their sentences were procedurally and substantively unreasonable.

BACKGROUND

The history of massive corporate fraud that forms the background of these proceedings has been set forth exhaustively in *United States v. Rigas*, 490 F.3d 208, 212-19 (2d Cir.2007). We supply here only a brief summary of the relevant procedural history.

Trial and Sentencing

In September 2002, the Rigases were indicted – along with Michael Rigas, James Brown, and Michael Mulcahey, who were also executives at Adelphia – on multiple counts of securities fraud, wire fraud, bank fraud, and criminal conspiracy. In June 2004, following a trial in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*), a jury convicted the Rigases of conspiracy, bank fraud, and securities fraud but acquitted them of wire fraud. Michael Rigas was acquitted of conspiracy and wire fraud, with the jury remaining deadlocked on the other counts; he later pleaded guilty to a charge of making a false entry in the books and records of Adelphia in violation of 47 U.S.C. § 220(e). Brown pleaded guilty prior to trial and testified as a government witness. Mulcahey was acquitted of all charges. *See Rigas*, 490 F.3d at 219.

For each of the Rigases, the initial Presentence Investigation Reports ("PSR"), prepared by the United States Probation Office ("Probation Office"), calculated, under the United States Sentencing Guidelines ("Guidelines"), a base offense level of six and recommended multiple sentencing enhancements: (1) twenty-six levels because the loss exceeded $100 million; (2) four levels because the offense involved more than fifty victims; (3) two levels because the offense involved sophisticated means; (4) two levels because defendants derived more than $1 million in gross receipts from financial institutions as a result of their offenses; (5) two levels because defendants abused the public trust; and (6) four levels because appellants were leaders of criminal activity that involve five or more participants. Based on these calculations, the PSRs concluded that the total

offense level for each of the Rigases was 46, their Criminal History Category was I, and the resulting sentencing range under the Guidelines was life imprisonment. However, the Probation Office recommended a term of ten years' imprisonment and five years' supervised release for John Rigas, and twenty years' imprisonment and five years' supervised release for Timothy Rigas.

At a sentencing hearing on June 20, 2004, the District Court announced that it would consider the Guidelines and the factors in 18 U.S.C. § 3553(a), and stated that, in its view, the PSR calculations were accurate. After hearing argument from counsel, the District Court imposed sentences that were more severe than those recommended in the PSR, but which nonetheless fell significantly below the recommended Guidelines ranges of life imprisonment. Specifically, the District Court sentenced John Rigas principally to an aggregate term of fifteen years' imprisonment. The Court divided his sentence as follows:

- 15 years on each of two counts of bank fraud, the sentences to run concurrently with each other;
- 5 years on one count of conspiracy and 10 years on one count of securities fraud, the sentences to run consecutively to each other and concurrently with the bank fraud sentence; and
- 10 years on one count of securities fraud, the sentences to run concurrently with each other and the other sentences.

The District Court sentenced Timothy Rigas principally to an aggregate term of twenty years' imprisonment, according to the following criteria:

- 20 years on each of two counts of bank fraud, the sentences to run concurrently with each other;
- 5 years on one count of conspiracy, 10 years on one count of securities fraud, and 5 years on another count of conspiracy, the sentences to run consecutively to each other and concurrently with the bank fraud sentence; and
- 10 years on each of the other securities fraud counts, the sentences to run concurrently with each other and the other sentences.

In addition, the Rigas family and the government reached a settlement of other matters, under which the Rigases forfeited over $1 billion in assets to Adelphia. The liquidated value of these assets was $715 million.

Appeal and Resentencing

The Rigases appealed their convictions, and on May 24, 2007, another panel of our Court affirmed the convictions on all counts except one count of bank fraud – "Count 23" – for which it found insufficient evidence. *See Rigas*, 490 F.3d at 236, 239. However, the panel concluded that there was sufficient evidence to support a related count of bank fraud – "Count 22." *Id.* at 235-36. The panel remanded the cause for resentencing. *Id.* at 239.

No new PSR was prepared for resentencing, but at the District Court's request, the Probation Office informed the District Court by letter that the appropriate sentence under the Guidelines was still life imprisonment because the "aggregate of the statutory maximum terms of the [remaining] counts of conviction" was 185 years, reduced from 215 years. Special App. 17. The District Court conducted a

resentencing hearing on May 22, 2008 and issued a written opinion and order on June 24, 2008. The District Court held that it was not required to resentence defendants *de novo* because Count 23 was a small part of the overall conviction and ran concurrently with Count 22, which this Court upheld. Accordingly, the District Court concluded that the reversal was akin to a "sentencing" error rather than a "conviction" error, and that only a "limited" resentencing was required. Special App. 18-19. The District Court expressly rejected the Rigases' argument that under *United States v. Quintieri*, 306 F.3d 1217 (2d Cir.2002), resentencing had to be *de novo* because the reversal was based on a "conviction" error, not a "sentencing" error, and characterized this distinction as a "mechanical" test. *Id.*

Nevertheless, the District Court concluded in an alternative holding that even under *de novo* or "holistic" resentencing, there was "no basis for a reduction of [a] sentence which is broader than the relatively minor adjustment occasioned by the reversal of Count 23. Indeed, . . . the sentence previously imposed was fully justified under all of the circumstances." Special App. 23. In reaching this conclusion, the District Court addressed and rejected the Rigases' challenges to the twenty-six level sentencing enhancement for loss in excess of $100 million. The Court also observed that the Rigases "made *no* claim that the reversal of [the conviction on] Count 23 . . . [affects] the strength or substance of the convictions on the 17 other counts as to which the Court of Appeals noted there was ample evidence." Special App. 23-24. Indeed, the District Court concluded that the reversal on Count 23 altered neither the applicable Guidelines range, nor "the seriousness of the[ir] . . .

crimes, nor the suffering which their conduct inflicted on so many people." Special App. 24.

Despite observing that there was "no basis for a reduction" in the Rigases' sentences, Special App. 23, the District Court in fact applied a "minimal adjustment," reducing each sentence by three years, to 12 and 17 years for John and Timothy Rigas, respectively. Special App. 24.

Motion for a New Trial

On July 5, 2007 – prior to resentencing – defendants filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the basis of alleged "newly discovered evidence" of perjury by their former co-defendant James Brown, who had testified at the criminal trial as a government witness and later allegedly provided contradictory testimony in a civil proceeding. On November 20, 2007, the District Court denied the motion on the grounds that (1) Brown did not commit perjury, *see United States v. Rigas*, No. 02-CR-1236, 2007 WL 4145282, at *1-5, 2007 U.S. Dist. LEXIS 85590, at *4-11 (S.D.N.Y. Nov. 20, 2007); (2) the post-trial depositions of Brown and other witnesses in a civil proceeding were newly *available*, not newly *discovered*, since defendants could have pursued their testimony before or during the criminal trial, but did not do so, *see id.* at *5, 2007 U.S. Dist. LEXIS 85590, at *11-15; and (3) even if Brown's testimony were perjured or newly discovered, it would not have affected the outcome of the criminal trial, *see id.* at *5-6, 2007 U.S. Dist. LEXIS 85590, at *15-16.

Motion to Compel Discovery

On December 4, 2007, defendants filed a motion to compel the government to produce its notes from

interviews with Carl Rothenberger, Adelphia's former lead outside counsel, and other witnesses not called by either party at trial. Defendants argued that the notes should have been disclosed to them pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The District Court denied the motion on January 15, 2008, reasoning that, *inter alia*, the government had no obligation to produce notes of witnesses who did not testify at trial, and the defendants knew or should have known of Rothenberger's existence as a possible witness and the relevance of his testimony. *See United States v. Rigas*, No. 02-CR-1236, 2008 WL 144824, at *1-2, 2008 U.S. Dist. LEXIS 2827, at *2 6 (S.D.N.Y. Jan. 15, 2008).

* * *

In this appeal, defendants challenge all three of the decisions of the District Court outlined above: (1) the June 24, 2008 resentencing order, (2) the November 20, 2007 opinion and order denying the Rigases' motion for a new trial, and (3) the January 15, 2008 memorandum and order denying the Rigases' motion to compel discovery.

DISCUSSION

A. Reasonableness of the Sentences

Following *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a district court has broad latitude to "impose either a Guidelines sentence or a non-Guidelines sentence." *United States v. Sanchez*, 517 F.3d 651, 660 (2d Cir.2008); *see also United States v. Cavera*, 550 F.3d 180, 190 (2d Cir.2008) (en banc). Accordingly, the role of the Court of Appeals is limited to examining a sentence for reasonableness, which is akin to review under an

"abuse-of-discretion" standard. *See Cavera*, 550 F.3d at 190; *see also Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007) (holding that "courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard"); *cf. Sims v. Blot*, 534 F.3d 117, 132 (2d Cir.2008) ("A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." (alteration, citations, and quotation marks omitted)). This standard applies "both to the [substantive reasonableness of the] sentence itself and to the procedures employed in arriving at the sentence." *United States v. Verkhoglyad*, 516 F.3d 122, 127 (2d Cir. 2008).

The Rigases allege that their sentences were procedurally unreasonable in several ways. Principally, the Rigases contend that the District Court did not resentence them *de novo* but instead conducted only a limited resentencing hearing. Alternatively, the Rigases argue that even under the District Court's alternative holding – for which the scope of resentencing was *de novo* – the Court committed several procedural errors, including failures to (1) conduct the individualized assessment required by 18 U.S.C. § 3553(a); (2) make an appropriate calculation of loss to justify a twenty-six-point sentencing enhancement; (3) exclude an enhancement for bank fraud; (4) find facts in support of a sentencing enhancement for leading a conspiracy; and (5) specify who exactly was harmed before imposing a "fifty victim" sentencing enhancement. Defendants also argue that their

sentences were substantively unreasonable because people convicted of "more serious" crimes, such as murder and terrorism, have been sentenced to only a few years more than the Rigases.

1. Scope of Resentencing

The Rigases argue principally that, following our decision in *Quintieri*, 306 F.3d at 1227-28, we have held that defendants must be resentenced *de novo* where a portion of a conviction has been reversed on appeal. The government asks us to affirm on the basis of the District Court's limited resentencing because (1) defendants did not challenge their sentences on the initial appeal, thereby waiving any arguments that the sentences were unreasonable, and (2) "the sentencing considerations relating to Count Twenty-Three were entirely severable from the considerations on the other counts," Appellee's Br. 35.

In *Quintieri*, we distinguished between *conviction* errors, for which *de novo* resentencing was the "default rule," and *sentencing* errors, for which limited resentencing was the default rule. We held:

> When the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing, the constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely altered. For the district court to sentence the defendant accurately and appropriately, it must confront the offenses of conviction and facts anew.

306 F.3d at 1227-28; *see also id.* at 1228 ("[R]esentencing usually should be *de novo* when a Court

of Appeals reverses one or more *convictions* and remands for resentencing . . . ."). *Quintieri* created a "default rule" that *de novo* resentencing is required where a conviction is reversed in part on appeal. *Quintieri*, 306 F.3d at 1229 n. 6 ("Today we conclude that when a resentencing results from a vacatur of a conviction, we in effect adhere to the *de novo default rule* . . . because multiple convictions are 'inextricably linked' in calculating the sentencing range under the guidelines." (emphasis added)).

Moreover, we recognized in *Quintieri* that "when a case is remanded for *de novo* resentencing, the defendant may raise in the district court and, if properly preserved there, on appeal to the court of appeals, issues that he or she had previously waived by failing to raise them." *Id.* at 1225. In clear contrast, we stated that limited resentencing was the default rule where there was a *sentencing* error; *de novo* resentencing was required for a *sentencing* error only where "one or more specific *sentencing* errors . . . would undo the sentencing calculation as a whole or the 'spirit of the mandate' otherwise requires *de novo* resentencing." *Id.* at 1228 n. 6 (emphasis added).

Accordingly, *Quintieri* supplies two pertinent rules: (1) where a count of a conviction is overturned – as opposed to an aspect of a sentence – resentencing must be *de novo*; and (2) *de novo* means "anew," *id.* at 1228, so that a defendant may raise issues even if they would otherwise have been waived.

Here, an experienced and respected judge expressed the view that these rules are unduly "mechanical." Special App. 19. It is nevertheless true that on more than one occasion since *Quintieri*, our Court has adhered to the "*de novo* default rule,"

however characterized, in successive cases where a portion of a defendant's conviction was overturned on appeal, even though the portion of the conviction that was overturned was unlikely to alter the ultimate sentence in any significant way. For example, in *United States v. Hertular* we explained that,

> although our reversal of [the defendant's] § 111 conviction changes the "constellation of offenses" relevant to sentencing, the "factual mosaic" may be little altered. Nevertheless, mindful that the law entrusts district courts, not courts of appeals, with the primary responsibility for weighing the totality of circumstances relevant to sentencing, we conclude that, even in these circumstances, we must vacate the defendant's sentence and remand the case to the district court so that it may decide, in the first instance, whether a conviction on three rather than four counts affects its assessment of the sentencing factors detailed in 18 U.S.C. § 3553(a).

562 F.3d 433, 446 (2d Cir.2009) (quoting *Quintieri*, 306 F.3d at 1228); *see also United States v. Draper*, 553 F.3d 174, 175-76, 184 (2d Cir.2009) (concluding, where defendants were convicted of "witness retaliation, witness tampering, narcotics, and firearm charges," that "because we are reversing the witness retaliation convictions, *de novo* resentencing is *required* and we are compelled to remand this matter to the district court in any event." (emphases added)). Indeed, we have also observed that *Quintieri* has particular salience in the post-*Booker* regime, under which a District Court must make an individualized assessment based on all the sentencing factors in § 3553(a). *See Hertular*, 562 F.3d at 446; *Gall*, 552 U.S. 38, 128 S.Ct. 586 at 591, 169 L.Ed.2d 445; *see*

also 18 U.S.C. § 3553(a)(1) (requiring an assessment of "the nature and circumstances of the offense"); *id.* at § 3553(a)(2) (requiring an assessment of the "seriousness of the offense," "adequate deterrence," and "just punishment").

In this case, the District Court concluded that a *de novo* resentencing was not required because our Court's reversal of the conviction on Count 23 was more akin to a "sentencing error" than a "conviction error." To reach this conclusion, the District Court decided first that Counts 22 and 23 were "quite different" from the remainder of the indictment, such that it was unlikely that the reversal of Count 23 would alter the appropriate sentence.[1] Special

[1] Our earlier decision in this case compels a conclusion that the consequences of the convictions on Count 23 were far from *de minimis*. As we observed, the alleged bank fraud "related to two of the three Co-Borrowing Agreements," *Rigas*, 490 F.3d at 217-18, which were required to "mask[] . . . debts that the Rigas family [and their privately-held companies] owed to Adelphia," *id.* at 215. Masking the Rigases' private debt as Adelphia's debt was a cardinal goal of their scheme to defraud Adelphia. *Id.*; *see also id.* at 232-33 (outlining the specific proof that would be required to sustain the bank fraud convictions and the mechanism of alleged fraud); *but see id.* at 234-35 (explaining that, under the circumstances, defendants' misrepresentations to the banks were not "material" and could not support the conviction for bank fraud on Count 23). In addition, John Rigas was originally sentenced to an aggregate term of 15 years' imprisonment and received 15-year terms on each of two counts of bank fraud. The most he received on any other count was 10 years (for securities fraud). Timothy Rigas was originally sentenced to an aggregate term of 20 years' imprisonment, and he was sentenced to a term of 20 years on each of two counts of bank fraud. The most he received on any other count was 10 years (for securities fraud). Under these circumstances, Count 23 was part of the "constellation of offenses" and "factual mosaic" of

App. 19. Accordingly, the District Court ruled that it could, consistent with *Quintieri*, conduct only a limited resentencing. *See, e.g., Quintieri*, 306 F.3d at 1225 ("We conclude that in this case, because we identified a particular *sentencing* issue necessitating remand – whether [the defendant's] total offense level on the conspiracy count was improperly enhanced as a result of 'double counting' – the remand was limited, not *de novo*. Because the remand was limited, [the defendant] may not now raise arguments that he had an incentive and an opportunity to raise previously but did not raise, absent a cogent and compelling reason for permitting him to do so." (emphasis added)); *United States v. Stanley*, 54 F.3d 103, 108 (2d Cir.1995) (concluding that *de novo* resentencing is unnecessary when the remanding court identifies a only sentencing error and does not explicitly limit the scope of resentencing).

We disagree with the premise of the District Court's analysis. *Quintieri* expressly created a "default rule" that resentencing is required where part of a conviction is reversed on appeal. *Quintieri*, 306 F.3d at 1228 n. 6 (holding that "when a resentencing results from a vacatur of a conviction, we in effect adhere to the *de novo default rule* of the Sixth, Eighth, Ninth, and Eleventh Circuit[s], because multiple convictions are 'inextricably linked' in calculating the sentencing range under the guidelines." (emphasis added)); *see also Draper*, 553 F.3d at 184 (stating that "because we are reversing the witness retaliation convictions, *de novo* resentencing is *required*" (emphasis added)). In *Quintieri*, we created a rule, not a guideline. To the extent that any language

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this case, *Quintieri*, 306 F.3d at 1228, and, sentencing on that count cannot be considered *de minimis*.

in *Quintieri* or cases that pre-date *Quintieri* suggest otherwise – *see, e.g.*, *Quintieri*, 306 F.3d at 1228 ("[R]esentencing *usually* should be *de novo* when a Court of Appeals reverses one or more convictions and remands for resentencing." (emphasis added)); *United States v. Atehortva*, 69 F.3d 679, 685-86 (2d Cir.1995) ("When a defendant challenges convictions on particular counts that are *inextricably tied* to other counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed." (emphasis added)) – we resolve any ambiguity today. In *Rigas*, the Court of Appeals identified a *conviction* error, not a mere sentencing error, when it reversed the convictions on Count 23. *See Rigas*, 490 F.3d at 239. Accordingly, the Rigases were entitled to be resentenced *de novo* at a plenary sentencing rehearing.

We also disagree with the government's proposed interpretation of *Quintieri*. According to the government, if a challenge to a sentence has been waived, the "law of the case" doctrine and *Quintieri* require resentencing *de novo* only where (1) the "spirit of the mandate" requires as much (such as when the reversed portion of the conviction is "inextricably linked" to the remainder of the conviction), (2) an issue became relevant only after appellate review, or (3) there is a "cogent" or "compelling" reason for resentencing *de novo*, such as a change in controlling law. Otherwise, the government argues, resentencing should be limited, not *de novo*.

The government assumes that these three considerations apply where an appellate court has reversed a *conviction*. However, it is clear from *Quintieri* that the three considerations identified by the government

apply only where an appellate court has reversed part of a *sentence*, not part of a *conviction*. *See* 306 F.3d at 1229 (discussing these exceptions under the heading "Implications of a Limited Remand"). The "spirit of the mandate" and other considerations identified by the government are exceptions to limited resentencing following reversal of a *sentence*:

> That resentencing usually should be *de novo* when a Court of Appeals reverses one or more *convictions* and remands for resentencing, then, does not deviate from the rule . . . that absent explicit language in the mandate to the contrary, resentencing should be limited when the Court of Appeals upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that [sentencing] error. To be sure, there may be circumstances when we reverse a *sentence* in which the "spirit of the mandate" requires *de novo* sentencing, for example when the reversal effectively undoes the entire "knot of calculation," but this is not such a case.

Quintieri, 306 F.3d at 1228 (final emphasis added); *see also id.* at 1229 n. 6 ("But when a resentencing is necessitated by one or more specific *sentencing* errors, unless correction of those errors would undo the sentencing calculation as a whole or the 'spirit of the mandate' otherwise requires *de novo* resentencing, we in effect adhere to the . . . default rule of limited resentencing." (emphasis added)); *id.* at 1230 ("[E]ven when a remand is limited, an issue may be raised if it arises as a result of events that occur after the original sentence.").

In *Quintieri*, we determined that the basis for the prior reversal was the defendant's *sentence* – specifi-

cally, "double counting," *see id.* at 1229 – not the defendant's *conviction*. Accordingly, we held that there was a presumption that resentencing would be limited, not *de novo*, but that the defendant would be entitled to *de novo* review if he could show that (1) the "spirit of the mandate" requires *de novo* sentencing, (2) an issue became relevant only after the initial appellate review, or (3) there is a "cogent" or "compelling" reason for resentencing *de novo*, such as a change in controlling law. By contrast, the prior appeal in the instant case reversed a portion of the defendants' *conviction*, and so defendants were entitled to be resentenced *de novo* and, as noted, to "raise in the district court and, if properly preserved there, on appeal to the court of appeals, issues that he or she had previously waived by failing to raise them." *Id.* at 1225.

To reiterate, on remand, a district court that is required to resentence *de novo* must reconsider the sentences imposed on each count, as well as the aggregate sentence. In such circumstances, the court should determine whether the "change[]" in the "constellation of offenses of conviction" has "altered" the "factual mosaic related to those offenses." *Quintieri*, 306 F.3d at 1227-28. If so, the court must reconsider the sentence imposed on the count or counts affected by the vacatur of the conviction of another count, as well as on the aggregate sentence, in light of the sentencing factors in § 3553(a). If the court determines that the "factual mosaic" related to a count of conviction has not been altered, no further proceeding as to that count is necessary, except to the extent it affects the aggregate sentence.

2. "Procedural Reasonableness"

We turn now to the District Court's alternative holding, in which the Court imposed a new sentence on the assumption that it was resentencing *de novo*. As noted above, the Rigases offer multiple arguments in support of their contention that the District Court's *de novo* resentencing was procedurally flawed – to wit, they argue that the District Court failed to (1) conduct the individualized assessment required by 18 U.S.C. § 3553(a); (2) make an appropriate calculation of loss to justify a twenty-six-level sentencing enhancement; (3) exclude an enhancement for bank fraud; (4) find facts in support of a sentencing enhancement for leading a conspiracy; and (5) specify who exactly was harmed before imposing a "fifty victim" sentencing enhancement. Although the Rigases have offered additional reasons why their sentences were procedurally unreasonable, we confine our discussion to these arguments, which consumed the bulk of the briefing on procedural reasonableness.

Regarding the statutory requirement of an individualized assessment of wrongdoing and appropriate punishment, *see* 18 U.S.C. § 3553(a), we observe that prior to the May 22, 2008 resentencing hearing, the District Court solicited from the Probation Office revisions to the original PSR. *See* Special App. 17. At the resentencing hearing, the District Court stated on the record that it had also read the Rigases' sentencing memoranda and would consider the factors in 18 U.S.C. § 3553(a). In our view, the Court's written ruling reflects its informed consideration of these factors. *See Cavera*, 550 F.3d at 189-190 (stating that our review for procedural reasonableness "requires that we be confident that the sentence resulted from the district court's considered judgment

as to what was necessary to address the various, often conflicting, purposes of sentencing"). In addition to specifically mentioning "the § 3553 sentencing considerations," Special App. 19, the District Court discussed the applicable Guidelines range (devoting considerable discussion to the twenty-six level additur for loss causation); the Rigases' continued argument that they "engaged in no criminal conduct but were themselves victims"; the seriousness of their offenses; and the suffering caused by the Rigases' crimes. Special App. 17, 19-24. That the District Court did not parse every sentencing factor individually or address in writing each of defendants' sentencing arguments does not render the ultimate sentence procedurally unreasonable. *See United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir.2006) ("We have imposed no . . . requirement that a sentencing judge *precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all the § 3553(a) factors along with the Guidelines applicable range."). As we have previously stated, "we presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors." *Id.* at 30.

With respect to loss causation, the Rigases argue at length that the losses in this case, including most notably the bankruptcy of Adelphia, "'may reflect, not the [Rigases'] misrepresentation[s], but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events.'" Appellant's Br. 32 (quoting *Dura Pharm. v. Broudo*, 544 U.S. 336, 343, 125 S. Ct. 1627, 161 L.Ed.2d 577 (2005)). The government

argues that the amount of loss attributable to the Rigases' fraud may be measured in billions, not millions, and so even if "the entire decline in Adelphia's market capitalization" was caused by a number of factors, the evidence presented at trial "was sufficient to demonstrate, by a preponderance standard, that substantially all of the decline was a 'reasonable estimate' of the loss." Appellee's Br. 48.

In calculating the amount of loss under the Guidelines, a sentencing court "need only make a reasonable estimate of the loss." U.S.S.G. § 2B1.1 cmt. n. 3(C). Although "[d]etermining this amount is no easy task[,] . . . some estimate must be made for Guidelines' [calculation] purposes, or perpetrators of fraud would get a windfall." *United States v. Ebbers*, 458 F.3d 110, 127 (2d Cir.2006). Although it is true that "[t]he loss must be the result of the fraud," *id.* at 128, as opposed to other, non-fraudulent occurrences, we agree with the District Court and the government that, regardless of the precise amount of the loss attributable to the Rigases' fraud, that figure easily exceeds $100 million. For example, as we noted in our previous opinion in this case,

> [t]he evidence at trial showed that throughout the period of the conspiracy, Defendants took over $200 million dollars from Adelphia's Cash Management System for personal expenses ranging from $200 to purchase 100 pairs of bedroom slippers for Timothy Rigas, to over $3 million to produce a film by Ellen Rigas, to $200 million to pay off Rigas family margin loans. The missing money was obscured by the commingling of cash between Adelphia and [privately-held companies owned by the Rigases].

Rigas, 490 F.3d at 218. In any event, the District Court reasoned that even if a loss of only $0.50 per share were attributable to the Rigases' fraudulent conduct, that would still satisfy the $100 million threshold for the sentencing adjustment applied to the count. *See* Special App. 22; *see also Rigas*, 490 F.3d at 212 (noting that on the day that Adelphia's $2.2 billion in previously unrecorded liabilities were disclosed, the company's stock price dropped "about twenty-five percent to $20.39," and that Adelphia filed for bankruptcy within months). Accordingly, we have no trouble affirming the District Court's estimate of loss caused by the Rigases' fraud.[2]

It is undisputed that, at resentencing, the government did not seek a two-level enhancement for bank fraud in excess of $1 million in gross receipts. The Rigases contend that the District Court considered it anyway, based on the District Court's comment in a footnote that the Rigases' arguments about the bank fraud enhancement were "totally without merit."

[2] The Rigases further contend that the District Court erred in calculating loss by not discounting the loss by the $715 million in liquidated private assets that the Rigas family pledged as collateral to several banks that underwrote co-borrowing agreements. Appellant's Br. 52 (citing U.S.S.G. § 2B1.1 cmt. n. 2(E)(ii) (providing that, "[i]n a case involving collateral pledged or otherwise provided by the defendant, [loss shall be reduced by] the amount the victim has recovered at the time of sentencing from disposition of the collateral")); *see generally Rigas*, 490 F.3d at 213-18 (describing the central role of co-borrowing agreements – bank loans for which Adelphia and private companies owned by the Rigases were jointly and severally liable for the debts – in the Rigases' fraud). We agree with the District Court that, even if the $715 million were considered, that amount was pledged only to banks to satisfy Adelphia's debts. The collateral could not compensate equity holders for their substantial losses. *See* Special App. 23.

Special App. 20 n. 3. On this basis alone, we cannot conclude that the District Court erroneously considered an abandoned sentencing enhancement for bank fraud. On resentencing, the District Court agreed with the Probation Office that the Rigases' offense levels surpassed what was required under the Guidelines for a recommended sentence of life imprisonment – the maximum aggregate sentence allowable – and then imposed sentences that were substantially *below* the applicable Guidelines range. As a practical matter, even without the two-level enhancement for bank fraud, the Guidelines would call for life imprisonment. Accordingly, whatever ambiguity exists in the record with respect to the District Court's consideration of the bank fraud enhancement is *de minimis*, and certainly does not render the sentence procedurally unreasonable.

We further disagree with the Rigases that the District Court erred in not making the necessary factual findings before adopting the PSR recommendation that the Rigases' roles in defrauding Adelphia warranted a four-level sentencing enhancement. *See* U.S.S.G. § 3B1.1 (authorizing a four-level adjustment for organizing or leading a criminal activity). The thrust of the Rigases' argument here is that the District Court failed to make adequate factual findings to support this enhancement. According to the Rigases, had the District Court scrutinized the record, it would have realized that the Rigases merely oversaw employees who committed fraud and were not themselves "criminally responsible" for any misconduct. Appellant's Br. 58.[3] We detect no error in the District

[3] This argument brings to mind the words of Judge Learned Hand, who confronted similar circumstances decades ago:

Court's conclusion, which "expressly adopt[ed] the position set forth by the government [at the] sentencing hearings, . . . [and] satisfied its obligation to make factual findings." *United States v. Eyman*, 313 F.3d 741, 745 (2d Cir.2002). For the same reason, we also reject the Rigases' argument that the District Court failed to specify who exactly was harmed before imposing a "fifty victim" sentencing enhancement.

3. "Substantive Reasonableness"

The Rigases also argue that their sentences were substantively unreasonable – that is, the sentences of twelve and seventeen years for John and Timothy Rigas, respectively, were "'greater than necessary'" to accomplish the purposes of sentencing (just punishment, deterrence, rehabilitation, etc.). Appellant's Br. 72 (quoting 18 U.S.C. § 3553(a)). In particular, the Rigases observe that their sentences for "white-collar" crimes are only slightly shorter than the sentences of some admitted or convicted terrorists. *See* Appellant's Br. 74. When, at oral argument, we inquired what a "substantively reasonable" sentence might be, counsel for the Rigases replied that it was unclear but that any sentence must take account of the Rigases culpability.

Where, as here, we have identified "'no significant procedural error' . . . , a reviewing court then 'consid-

> As is usual in such cases, we are urged – incidentally in a brief whose length and prolixity only serves to confuse the reader – to substitute ourselves for the jury and try the merits over again. We shall not labor the point that this we cannot do; but we do wish to emphasize that the established character of the scheme was alone enough to condemn it.

United States v. Bronson, 145 F.2d 939, 942 (2d Cir.1944) (L. Hand, *J.*).

ers the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard,' taking 'into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' " *Cavera*, 550 F.3d at 200 (Raggi, *J.*, concurring) (brackets omitted) (quoting *Gall*, 128 S.Ct. at 597). As the en banc court observed in *Cavera*, "[w]e will . . . set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" 550 F.3d at 189 (quoting *Rigas*, 490 F.3d at 238 (summarizing the abuse of discretion standard)). For example,

> [a]t the substantive stage of reasonableness review, an appellate court may consider whether a factor relied on by a sentencing court can bear the weight assigned to it. To be sure, this review is deferential. As a result, we do not consider what weight we would ourselves have given a particular factor. Rather, we consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case.

Cavera, 550 F.3d at 191 (citations omitted).[4] Accordingly, our role in sentencing appeals is to "patrol the boundaries of reasonableness, while heeding the Supreme Court's renewed message that responsibility

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[4] The Rigases do not argue that any particular sentencing factor in 18 U.S.C. § 3553(a) "can[not] bear the weight assigned it under the totality of circumstances," *Cavera*, 550 F.3d at 191. Instead, they argue that the District Court "gave no specific consideration to *any* § 3553 factors," Appellant's Br. 72, and ultimately "impose[d] punishment far greater than necessary and betray[ed] the balance struck by § 3553," *id.* at 75.

for sentencing is placed largely in the precincts of the district courts." *Id.*

Our decisions addressing substantive reasonableness have focused more on the process of sentencing than on actually defining the boundaries of substantive reasonableness. Insofar as we have defined as "unreasonable" a sentence that "'cannot be located within the range of permissible decisions,'" *id.* at 189 (quoting *Rigas*, 490 F.3d at 238), that definition is obviously circular – what is reasonable or unreasonable is what other cases have deemed reasonable or unreasonable. It is therefore unsurprising that several courts, including our own, have cautioned against converting review for substantive reasonableness into a "rubber stamp." *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir.2006) ("Our review for reasonableness, though deferential, will not equate to a 'rubber stamp.'"); *see also United States v. Pinson*, 542 F.3d 822, 836-37 (10th Cir.2008) ("[U]ntil the Supreme Court tells us otherwise[,] appellate review continues to have an important role to play and must not be regarded as a rubber stamp."); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir.2006) ("Although [a reasonableness] standard clearly requires us to afford a degree of deference to the sentencing decisions of the district court, 'reasonableness' is not a code-word for 'rubber stamp.'").

In other areas of the law, we employ various concepts that seek to capture the same idea represented in the phrase "substantive reasonableness." For example, we held that in considering a motion for a new trial in a criminal case following a jury verdict, the essential inquiry is whether a guilty verdict is manifestly unjust. *See, e.g., United States v. Josephberg*, 562 F.3d 478, 488 (2d Cir.2009) ("In deciding

. . . a motion [for a new trial], the district court must take care not to usurp the role of the jury, and the ultimate consideration is whether letting a guilty verdict stand would be a manifest injustice."). We examine intentional torts by state actors under a similarly imprecise "shocks-the-conscience" standard. *See, e.g., O'Connor v. Pierson*, 426 F.3d 187, 203 (2d Cir.2005) (observing that "'the measure of what is conscience-shocking is no calibrated yard stick'" and that "the test 'points clearly away from liability, or clearly toward it, only at the ends of the . . . spectrum'") (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)).

The manifest-injustice, shocks-the-conscience, and substantive unreasonableness standards in appellate review share several common factors. First, they are deferential to district courts and provide relief only in the proverbial "rare case." Second, they are highly contextual and do not permit easy repetition in successive cases. Third, they are dependent on the informed intuition of the appellate panel that applies these standards. In sum, these standards provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law[5] *See Rita v. United*

[5] To say that a sentence is "substantively unreasonable" is not to say that "no reasonable person" would have imposed such a sentence. We may generally assume that federal judges are "reasonable" people in the commonsense definition of the term. Nonetheless, even reasonable individuals can make unreasonable decisions on occasion. The Supreme Court recognizes this and has charged the Courts of Appeals with reviewing the substance of sentences for reasonableness, and we cannot employ a

States, 551 U.S. 338, 365, 127 S.Ct. 2456, 168 L.Ed. 2d 203 (2007) (Stevens, *J.*, concurring) ("[A] district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable."). Of course, an "intuitive" review cannot be an invitation to mischief by tinkering with any sentence that appellate judges simply do not like. *See Gall*, 128 S.Ct. at 597 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."); *Cavera*, 550 F.3d at 191 (same). Responsible appellate review of sentences necessarily places great trust in sentencing courts while still recognizing the responsibility to examine the actual sentence itself (quite apart from the procedures employed in arriving at the sentence).

Applying these general principles of "substantive reasonableness" to the instant case, we have no trouble concluding that, in the circumstances presented, the sentences imposed on the Rigases were reasonable. Indeed, we confronted many of the same arguments in reviewing the sentence of Bernard Ebbers, the former Chief Executive Officer of WorldCom, Inc. *See Ebbers*, 458 F.3d at 112, 129. Ebbers was convicted by a jury on multiple counts of conspiracy and securities fraud and received a sentence consisting principally of 25 years' imprisonment. *Id.* at 112. On appeal, Ebbers argued, among other things, that his sentence was unreasonably long, even though it was shorter than the recommend Guidelines sentence in that case (thirty years to life). *See id.* at 129 & n. 4. We recognized the potential

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definition of "substantive unreasonableness" that would render the required review a dead letter.

shortcomings of the Guidelines sentences for "white-collar" offenses, including the apparent disparity between sentences for non-violent, corporate crimes and violent crimes punishable under state law:

> Twenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation. However, Congress has directed that the Guidelines be a key component of sentence determination. Under the Guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment.
>
> Ebbers' 25 year sentence is actually below the Guidelines level. Even the threat of indictment on wafer-thin evidence of fraud may therefore compel a plea. For example, a [$ 0.15] decline in share price in a firm with only half the number of outstanding shares that WorldCom had would constitute a loss of $ 200 million. No matter how many reasons other than the fraud may arguably account for the decline, a potential defendant would face an enormous jeopardy, given the present loss table, and enhancements for more than 250 victims, for being a leader of a criminal activity involving 5 or more participants, and for being an officer of the company.

Id. at 129. Nonetheless, we concluded in *Ebbers* that, in the circumstances presented, stiff Guidelines sentences for "white-collar" crimes "reflect[ed] Congress' judgment as to the appropriate national policy for such crimes." *Id.* We also noted that Ebbers' fraud, like the Rigases' crimes, "were specifically intended to create a false picture of profitability

even for professional analysts" and were "motivated by . . . personal financial circumstances." *Id.* at 130; *see also Rigas*, 490 F.3d at 214 (observing that in order to fulfill certain obligations to purchase Adelphia stock, the Rigases "borrowed funds to pay Adelphia, but then caused Adelphia to use that cash to pay off other family debts"); *id.* at 215 ("The government argued, and the jury apparently agreed, that [general] ledger entries [regarding co-borrowed debt] were fraudulent and intended to mislead stockholders and analysts about the debt the Rigas family and [their privately-held companies] owed to Adelphia."); *id.* at 215-17 (explaining how the Rigases were personally responsible for manipulating and approving publicly filed earnings information and other data); *id.* at 237 n. 42 (noting that the jury heard "evidence of acts that occurred during the period charged in the indictment," including "evidence that Adelphia paid more than $500,000 for antiques in John Rigas's possession" and that the Rigases "used Adelphia funds and other assets for their personal benefit, and that of other members of the Rigas family").

Accordingly, we cannot conclude that this is the "rare case" that "'cannot be located within the range of permissible decisions.'" *Cavera*, 550 F.3d at 189 (quoting *Rigas*, 490 F.3d at 238). In light of the circumstances of the fraud perpetrated by the Rigases, the sentences imposed by the District Court on resentencing, which "reflect Congress' judgment as to the appropriate national policy for such crimes," *Ebbers*, 458 F.3d at 129, do not constitute a "manifest injustice" or "shock the conscience," and do not otherwise compel a conclusion that they are substantively unreasonable.

B. Motion for a New Trial

The Rigases also appeal the District Court's denial, in an opinion filed on November 20, 2007, of their Rule 33 motion for a new trial on the basis of "newly discovered evidence."[6] *See Rigas*, 2007 WL 4145282, at *5, 2007 U.S. Dist. LEXIS 85590, at *16. They argue, as they did before the District Court, that former co-defendant who testified as a government witness – James Brown, the former Vice President of Finance at Adelphia – gave testimony in subsequent civil proceedings that contradicted his testimony at trial.

We review motions for a new trial under an "abuse-of-discretion" standard. *See, e.g., United States v. Owen*, 500 F.3d 83, 87 (2d Cir.2007); *cf. Sims*, 534 F.3d at 132 (explaining the "abuse-of-discretion" standard).

In a comprehensive opinion, the District Court compared Brown's testimony in a civil case to his testimony in the criminal case and found that they were largely consistent and did not indicate any perjury. Specifically, the Court found that Brown admitted to lying to Adelphia's auditors in a "variety of formats," *Rigas*, 2007 WL 4145282, at *2, 2007 U.S. Dist. LEXIS 85590, at *6, some of which were explored in greater detail in a subsequent civil enforcement proceeding conducted by the United States Securities and Exchange Commission ("SEC"). The District Court also concluded that Brown's testimony was not

[6] Rule 33(a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant an new trial if the interest of justice so requires." Rule 33(b)(1) establishes a three-year window for "motion[s] for a new trial grounded on newly discovered evidence."

newly *discovered*, but was simply newly *available*. *Id.* at *6, 2007 U.S. Dist. LEXIS 85590, at *15 ("Because the testimony that [the Rigases] cite could have been available if [they] had subpoenaed these witnesses at the time of [the criminal] trial, there is no newly discovered evidence within the meaning of Rule 33."); *see also Owen*, 500 F.3d at 89 ("[W]e now join the majority of circuits to have addressed the issue and hold that Rule 33 does not authorize district courts to grant new trials on the basis of . . . evidence [that] is not newly discovered, but merely newly available."). Finally, the District Court determined that Brown's civil testimony would have had no effect on the outcome of the criminal prosecution of the Rigases. *Rigas*, 2007 WL 4145282, at *6, 2007 U.S. Dist. LEXIS 85590, at *15-16.

The District Court's November 20, 2007 opinion and order does not contain an error of law, is not based on any clearly erroneous assessment of facts, and is not outside the scope of permissible decisions. Accordingly, we affirm the denial of defendants' Rule 33 motion for a new trial.

C. Motion to Compel Production of Interview Notes

Finally, the Rigases argue that the District Court erred in not ordering the government to produce notes from interviews with various witnesses – principally notes from interviews with Carl Rothenberger – Adelphia's former lead outside counsel. The Rigases further contend that the government was constitutionally compelled to disclose the notes pursuant to the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

We review a district court's ruling on a motion to compel discovery under an "abuse-of-discretion"

standard. *See, e.g., OSRecovery, Inc. v. One Groupe Int'l., Inc.*, 462 F.3d 87, 94 (2d Cir.2006); *cf. Sims*, 534 F.3d at 132 (explaining the "abuse-of-discretion" standard).

In this case, the District Court concluded that the government had no obligation under *Brady* or the Jencks Act, 18 U.S.C. § 3500 – the statute codifying the government's disclosure obligations during criminal proceedings – to disclose its interview notes with Rothenberger because he did not testify at the trial. *See Rigas*, 2008 WL 144824, at *1, 2008 U.S. Dist. LEXIS 2827, at *2; *see also* 18 U.S.C. § 3500(a) ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*" (emphasis added)). In addition, the District Court found that the government was not in exclusive possession of any exculpatory information, since defendants knew of Rothenberger's role at Adelphia and the facts about which he could testify; accordingly, *Brady* did not compel disclosure of the government's interview notes with Rothenberger. *See United States v. Paulino*, 445 F.3d 211, 224 (2d Cir.2006) ("To establish a *Brady* violation, a defendant must show [*inter alia*, that] . . . the evidence must have been suppressed by the State, either willfully or inadvertently . . . ." (internal quotation marks omitted)); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.1987) ("[N]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.").

See generally United States v. Coppa, 267 F.3d 132, 140 (2d Cir.2001) ("Although the government's obligations under Brady may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty – and, concomitantly, the scope of the defendant's constitutional right – is defined retroactively, by reference to the likely effect that the suppression of evidence had on the outcome of the trial."). Finally, the District Court found that the United States Attorney's Office was not in possession of notes from SEC interviews with Rothenberger or other witnesses, and did not have an obligation to disclose what they did not possess. *See Rigas*, 2008 WL 144824, at *2, 2008 U.S. Dist. LEXIS 2827, at *5-6.

We detect no error in the District Court's January 15, 2008 Order denying defendants' motion to compel discovery. Accordingly, we affirm.

CONCLUSION

To summarize:

(1) The District Court was required to resentence defendants *de novo* following the reversal of a portion of defendants' convictions by another panel of this Court.

(2) Based on the District Court's alternative ruling in its June 24, 2008 resentencing order, in which the Court resentenced defendants *de novo*, we conclude that the new sentences imposed on the Rigases were procedurally and substantively reasonable.

(3) We detect no error in the District Court's November 20, 2007 opinion and order denying the Rigases' motion for a new trial.

(4) We detect no error in the District Court's January 15, 2008 memorandum and order denying the Rigases' motion to compel discovery.

We have considered all of the Rigases' arguments on this appeal. For the reasons stated above, we AFFIRM the judgment of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Cr. 1236 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants.

OPINION AND ORDER

SAND, District Judge.

I. Procedural Background

A. On June 27, 2005 after a jury trial of over four months resulted in the conviction of defendants on 18 counts, this Court imposed a sentence of 15 years incarceration on John Rigas and 20 years on Timothy Rigas.

On May 24, 2007, the Court of Appeals affirmed the conviction on all but one count (Count 23) which it reversed and "*remanded*" for an entry of *acquittal* on Count Twenty-Three "and for resentencing." 490 F.3d 208, 239 (2d Cir. 2007)

Count 23 was a charge of bank fraud involving the OCH Co Borrowing agreement. The Court of Appeals held that "the evidence submitted to a jury cannot support a finding that any misrepresentations regarding [this agreement] were material. 490 F.3d at 236.

With regard to Count 22 involving the OCH Co-Borrowing agreement which provided that a higher interest rate would be charged if the leverage ratio was above 5.0, the Court of Appeals found the evidence was sufficient to establish that the misrepresentations were material and affirmed the conviction on Count 22. *Id.*

This Court had sentenced John Rigas to 15 years on Counts 22 and 23 to run concurrently with each other and concurrently with Counts 1 and 2 through 16. Timothy Rigas was sentenced to 20 years on Counts 22 and 23 to run concurrently with all counts.

The Rigas's applied to the Supreme Court for Certiorari which was denied on March 3, 2008.

In the interim, between the Court of Appeals decision and the resentencing hearing, defendants moved for a new trial pursuant to F.R. Crim. Proc. 33 on the grounds that newly discovered evidence in the form of testimony given by the government's central witness (James Brown) at a civil trial demonstrated that his testimony at the criminal trial was perjurious. The Court denied the motion on November 20, 2007, holding that:

> "We conclude that in the context of the entire trial and considering the challenged testimony in its entirety, rather than as isolated and inapposite comparisons of Brown's testimony at trial with subsequent testimony as to different and more specific questions, the jury's verdict would not have been different had it considered the allegedly conflicting testimony."

No new PSR was prepared for the resentencing, but by letter dated April 29, 2008, prepared at the

Court's request (Court Ex. A) the probation officer opined:

> "Inasmuch as none of the counts of conviction carries a lifetime term of imprisonment, the guideline range of life is effectively capped by the aggregate of the statutory maximum terms of the counts of conviction. With the dismissal of Count 23 (which carried a 30-year maximum), this aggregate amount is now 185 year (as opposed to 215 years).
>
> The dismissal of Count 23 has no bearing on the term of supervised release, since such terms must run concurrently. The special assessment, however, must be reduced by $100.00."

The rehearing on sentencing took place on May 22, 2008.

At that hearing John Rigas and Timothy Rigas waived the right to be physically present in open court when the court pronounces the amended sentence and agreed that this Court may file an opinion and order without further in-court proceedings. See Transcript, May 22, 2008, pp113-116.

II. The Issues

A. Scope of hearings.

Defendants relying on *U.S. v. Quintieri*, 306 F.3d 1217 (2nd Cir. 2002) take the position that the consequence of the remand is to open up for de novo review all counts of conviction because the reversal was based on a "conviction error" not a "sentencing error", i.e. an error other than use of an improper guideline or an error in the sentencing calculation. Defendants assert that this is so even if there is no factual nexus between the "conviction error" and other counts which were affirmed. Defendants fur-

ther contend that they may as part of the de novo resentencing rely on evidence that was not introduced during the trial and are not precluded from advancing claims which were available to defendants but not raised at the time of the original sentencing or appeal.

The Government believes that de novo review of all counts is not required by *Quintieri* and is inappropriate on the facts of this case and that the usual rules of waiver and "rule of the case" preclude the raising of previously abandoned issues. Mindful of the fact that defendants may be expected to appeal every issue the Government urges that this Court make alternative findings based on either de novo or limited review. Transcript, May 22, 2008, p. 94.

In *Quinteiri* the Court of Appeals discussed an issue which arises where, as here, the appellate court remands for resentencing without explicitly stating whether limited or de novo review is intended (306 F.3d at 1226 1281). The Court contrasted those cases where a sentencing error has little or no impact on counts unaffected by the error and those cases in which:

> "A district court's sentence is based on the constellation of offenses for which the defendant was convicted and their relationship to a mosaic of facts, including the circumstances of the crimes, their relationship to one another, and other relevant behavior of the defendant. When the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing, the constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely

altered. For the district court to sentence the defendant accurately and appropriately, it must confront the offenses of conviction and facts anew."

We turn then to the application of these principles to this case. As noted defendants were tried and convicted on 18 counts. Count one alleged a conspiracy to commit securities fraud, conspiracy to make and cause to be made false statements in filings with the SEC and conspiracy to commit bank fraud under 18 U.S.C. § 37. Counts two through 16 alleged securities fraud under 15 U.S.C. §§ 78j(b) and 78 ff and 18 U.S.C. § 2). The last two counts, counts 22 and 23 alleged bank fraud under 18 U.S.C. 1344.

As to John Rigas the Court had imposed a sentence of 15 years and as to Timothy Rigas a sentence of 20 years on counts 22 and 23 to run concurrently with each other and with all other counts.[1]

These circumstances, in our opinion, cause this resentencing to bear greater resemblance to the "sentencing error" cases discussed in *Quintieri* than to the "conviction error" cases where the reversal of one count casts the other counts into a new light and the factual relationship to those offenses that the district court must consult to determine the appropriate sentence is "likely altered."

Counts 22 and 23 were quite different from the other counts of the indictment. The scheme alleged

[1] The maximum sentences for the various counts on the facts of this case bear little relationship to their importance. Thus count one, the conspiracy count, carries a maximum sentence of only five years but it was the key count of the case. Once this Court had determined the total non-guideline sentence the allocation of sentences to the various counts was an arbitrary allocation based on the maximum sentences allowable.

in those two counts was intended to lower the banks interest charges to Adelphia. The intended victims of these schemes were the banks, not the intended investor/stockholder victims of the other deceptive practices alleged in the indictment.

In arguing that the Court should review de novo all of the counts in the case defendants, despite their voluminous submissions, make no attempt to show a nexus between Count 23 and the affirmed counts that would impact on sentencing considerations. Rather they rely on random passages in *Quintieri* and on a mechanical test: if the error is a "conviction" error not a sentencing error a de novo review of all counts is required regardless of the context.

As an example of an instance in which in this case reversal of one count would have made appropriate a reconsideration of all other counts we point to what would be before the Court if the reversed count had been count one (the conspiracy count). All that defendants say about the need for de novo review of other counts would be valid because the substantive counts would then be viewed in a radically different light if they had not been in furtherance of an overall conspiracy.[2]

We conclude that de novo review of all counts is not required. The question before the Court for limited resentencing is: "What impact on sentencing does it have that defendants were found guilty of only one count of bank fraud rather than two because of the absence of sufficient evidence of materiality on one of

[2] Indeed when the jury acquitted the defendant Michael Rigas on the conspiracy count and could not agree on the other counts his case was severed and has been resolved before another judge.

the counts?" We believe that the reversal of count 23 has minimum impact on the § 3553 sentencing considerations. We reduce the sentence on count 22 to reflect this view.

III. De Novo Review of Other Counts

Alternatively as urged by the government, we treat herein some of the specific challenges made by defendants to counts other than Counts 22 and 23. We have considered all of defendants' claims and find that none of them warrant revision of the sentence previously imposed on the non-bank fraud counts[3].

Much of defendants' argument for a lower overall sentence is an attack on the government's principal witness James Brown, and the defense of reliance on professional advisors, the Adelphia accountants, Deloitte and Touche, and attorneys Buchanan Ingersoll. Defendants rely heavily on testimony and documents introduced in civil litigation which followed the criminal case. Having failed in their effort to obtain a new trial via a rule 33 motion, they now seek to utilize these arguments in the guise of resentencing considerations. But of course remand for resentencing is not an invitation to retry the case.

The defense of reliance on professional advisors was asserted at the trial and failed to persuade the jury. The Court of Appeals observed, 490 F.3d at 214, fn 4.

> 4 Defendants continue to assert they were acting on the advice of inestment [*sic*] advisors with

[3] We discuss some of these claims briefly herein. Others such as challenges to guideline enhancements related to the number of victims, obtaining more than $1,000,000.00 in gross receipts and being leaders of criminal activity are totally without merit and require no further discussion.

only the best intentions of Adelphia in mind. We do not think these arguments preclude Defendant's criminal liability.

Although defendants give lip service to the nature of these proceedings ("the convictions of John and Tim Rigas can not be revisited at this time." Resentencing Memorandum of John Rigas and Timothy Rigas, p. 1) the overall thrust of their claims is that the Rigases engaged in no criminal conduct but were themselves victims.[4] Although we recognize that a de novo review on resentencing may include consideration of newly preferred evidence it is not intended to be a new trial of issues which have been known to defendants and previously argued to the district and appellate courts.

The roles of Deloitte and Touche and Buchanan Ingersoll were the subject of considerable testimony at the trial and initial sentencing. Although defendants now proffer other instances of alleged inconsistencies or awareness by professional advisors of what was being done and good intentions they do not change the basic nature of the relationship which existed over the years between the defendants, Adelphia and their professional advisors. Nor does it overcome the verdict of guilt on count one (conspiracy)

Loss causation

Defendants assert that the laws with respect to loss causation have changed since the trial and initial sentencing and that the 26 level guideline enhancement was erroneous. Defendants assert that

[4] This approach is consistent with the statements made by Timothy and James Rigas at the outset of the sentencing rehearing.

United States v. Rutkoske, 506 F.3d 170, (2d Cir. 2007) imported into the criminal law the standards for loss causation which prevail in civil litigation.

The Government replies by asserting that defense counsel made the same argument advanced here at the initial sentencing (Government Re-Sentencing Memorandum p. 11) based on cases which anteceded *Rutkoske* and the trial. But the Government further argues "On direct appeal, however, defendants raised absolutely no challenge to their sentences." Therefore the Government asserts the loss issues are the law of the case and defendants have waived this argument by failing to present it on direct appeal.

We need not however decide the waiver issue because on the merits defendants claims are transparently invalid. Defendants assert that the Government must prove loss causation with precision and they produce an expert report to demonstrate that the proof of loss in this case did not satisfy that standard. But as the court said in the *Rutkoske*

> "Determining the extent to which a defendant's fraud, as distinguished from market or other forces, caused shareholders' losses inevitably cannot be an exact science. *See Ebbers*, 458 F.3d at 127 ("no easy task"). The Guidelines' allowance of a "reasonable estimate" of loss remains pertinent. And cases might arise where share price drops so quickly and so extensively immediately upon disclosure of a fraud that the difference between pre- and post-disclosure share prices is a reasonable estimate of loss caused by the fraud." Rutkoske, 506 F.3d 179-180

Here, as the Court of Appeals summarized the facts:

"Adelphia Communications Company ("Adelphia") announced its 2001 Fourth Quarter and Full-Year results in a March 27, 2002 press release. In a footnote on the final page of that press release, Adelphia, at the recommendation of its accounting firm, Deloitte & Touche, first disclosed publicly that it had approximately $2.2 billion in liabilities not previously reported on its balance sheet. On the day of disclosure, Adelphia's stock price plummeted by about twenty-five percent to $20.39; by the time the stock was delisted in May 2002, the price per share was $1.16. The company filed for bankruptcy in June 2002, wiping out all shareholder value." 490 F.3d at 212.

To establish loss causations to meet the guideline requirement for a 26-level guideline enhancement (U.S.S.G. § 2B1.1) the Government need only demonstrate that defendants' criminal conduct caused a loss of at least one hundred million dollars.

The governments [*sic*] calculates that: "Excluding Class A common shares owned by the Rigas family (approximately 23 million shares), there were approximately *205,416,284 shares* of Adelphia Class A common stock outstanding on March 27, 2002. In order for there to be more that $100 million in losses to the common equityholders only, there would need only be a reduction in market price, caused by the criminal conduct for which the defendants stand convicted, of merely $0.50, resulting in a loss of $102,708,142. Moreover, this figure represents only equity losses, not debt. To illustrate, were the $0.50 loss figure cut in half and divided between equityholders and bondholders, the Government would need only

prove that each class of victims suffered a loss of $0.25 per share or bond in order to sustain $100 million in losses." Gov't Br., p. 19.

The Government further notes: "Adding all of these loss figures together – of equityholders, bondholders, and Adelphia – there can be no legitimate dispute that even using the "grossest calculation," *see Ebbers*, 458 F.3d at 128, the total loss is greater than $100 million necessary to establish the 26-level enhancement under U.S.S.G. § 2B1.1. Indeed, there are dozens of Adelphia security holders whose losses alone exceed $100 million, including the Tow Charitable Trusts, which submitted a letter to the Court, and the funds controlled by W.R. Huff, which objected to the financial settlement in this case. As the Court is well aware, Mr. Tow appeared at the initial sentencing and described the devastating impact of the losses from the Adelphia shares owned by his charitable and family trusts. (June 20, 2005 Sent. Tr. pp. 4-9). The foregoing demonstrates that there are many, independent evidentiary bases upon which the Court can find that a "reasonable estimate" of the economic loss in this case far exceeds $100 million." Gov't. Br. pp. 22-23 (footnote omitted).

Defendants' challenges to the loss calculation need not long detain us. Defendants point to other loss factors (e.g. the adverse news about ABIZ and the general market decline for cable TV companies) but the numbers here are of such scope, the immediate press reaction to the disclosure of over two billion dollars in undisclosed debt so compelling that the claim that there was not a reasonable calculation of a loss of at least $100 million borders on the frivolous

and is not made any less meritless because it is the subject of "expert" analysis.

Defendants seek to separate the loss occasioned by the disclosure of the $2 billion of unrecorded debt from other events such as the failure of Adelphia to file a timely Form 10-K as if this circumstance were totally separate from, the debt nondisclosure. Of course any loss associated with the 10-K non-filing is directly related to the non-disclosure by the defendants of the unrecorded debt. In any event the market did not decline when Adelphia announced it was not filing a timely 10-K.

The defendants raise for the first time, the claim that they are entitled to a $715 million loss offset for the moneys paid by the Rigas Family entities as part of the settlement with the Government concerning restitution and forfeiture. Assuming arguendo that the argument is preserved, it is without merit. The Guideline provisions relating to loss offsets have reference to payments made to victims *prior* to the prosecution and conviction of the perpetrators. Nor are Defendants entitled to an offset on the theory that the payments made as part of the forfeiture settlement were of collateral for the debt. "The collateral in this case was pledged to the *banks* who made the loan under the co-borrowing agreement. The collateral was not pledged to Adelphia, nor to Adelphia's security holders (equity or debt)." See Gov't Br. p. 33.

SUMMARY

Defendants urge that we approach resentencing in a holistic fashion and in our alternative holding we have done so. We find no basis for a reduction of sentence which is broader than the relatively minor adjustment occasioned by the reversal of Count 23.

Indeed we find that the sentence previously imposed was fully justified under all of the circumstances.

Defendants claim that the prosecution and verdict reflect a "post Enron" hysteria ignores the fact that a conscientious jury after four months of trial acquitted one defendant on all counts and Michael Rigas on the conspiracy count. The strength of the Government's case, not any over reaction to events elsewhere, explain the guilty verdicts and this Court's prior sentences.[5]

Conclusion and Resentence

Having found nothing in defendant's overall claims to warrant a general sentence reduction and defendants having made *no* claim that the reversal of count 23 for failure of the prosecution to prove materiality impacts on the strength or substance of the convictions on the 17 other counts as to which the Court of Appeals noted there was ample evidence, we return to the question before the Court. What sentence alteration, if any, would fairly and adequately reflect the reversal of the conviction on count 23 the sentence for which was concurrent with that on count 22 which was affirmed. We believe that a minimal adjustment is appropriate. The reversal on count 23 did not alter the guidelines. More importantly it in no meaningful way altered the seriousness of defendants' crimes, nor the suffering which their conduct inflicted on so many people.

[5] The Court of Appeals in rejecting objections based on receipt of questioned evidence noted "these defendants would have to show that improperly admitted evidence had a substantial effect on the jury's verdict". The Court wrote "Given the weight of evidence supporting the jury's verdict on each charge we conclude that they have not done so". 490 F.3d at 239.

As to John Rigas we reduce the sentence on Count 22 from fifteen (15) years to twelve (12) years to run concurrently with counts 1 and 2 through 16 and reduce the sentence on counts 2-16 from ten (10) years to seven (7) years each (to effect an overall reduction of three (3) years on the total sentence).

The sentence will be:

Count 1:	5 years
Counts 2-6:	7 years to run concurrently with each other but consecutively to Count 1.
Count 22:	12 years to run concurrently with counts 1 and 2 through 16.

Total sentence 12 years.

As to Timothy Rigas we similarly reduce the sentence on Count 22 from 20 years to 17 years and adjust the allocation of sentences so as to effect a three year reduction in the original 20 year sentence.

Thus, as to Timothy Rigas the sentence will be:

Count 1:	5 years
Count 2:	10 years consecutive to count 1.
Count 3:	5 years concurrent to counts 1 and 2.
Counts 4-16:	10 years concurrent with each other and counts 1, 2 and 3
Count 22:	17 years to run concurrently with all counts.

Total sentence 17 years.

The sentence is a non-guideline sentence and as we explained previously the allocation among the various counts is a random allocation not intended to reflect the seriousness of each count.

We will amend the prior judgment to reflect the above sentences, eliminate count 23 as a count of conviction and reduce the assessment from $1,800.00 to $1,700.00. (We were advised at oral argument that the $100.00 has already been refunded to the defendants.)

All other terms and conditions of the original sentence remain unchanged.

SO ORDERED.

Dated: June 24, 2008
New York, New York

/s/ LEONARD B. SAND
U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Cr. 1236 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants.

MEMORANDUM AND ORDER

SAND, District Judge.

Defendants John J. Rigas and Timothy J. Rigas have moved to compel production of notes taken by prosecutors during interviews with potential witnesses prior to trial in this case. Specifically, defendants claim that they are entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), to notes from interviews with Carl Rothenberger, Adelphia's lead securities lawyer, and other witnesses. For the reasons discussed below, defendants' motion is denied.

First, the defendants' motion argues that with respect to Rothenberger, the *Brady* material produced by the government before trial was insufficient. In contrast, the government contends that its identification of Rothenberger complied with the requirements under *Brady*. The statute codifying its disclosure obligations states, "[i]n any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Gov-

ernment witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*" 18 U.S.C.S. § 3500 (emphasis added). Thus, because Rothenberger was not called as a witness at trial, the government had no statutory obligation to turn over his statements or the government's notes.

Further, the government's obligation to produce exculpatory material under *Brady* does not include the notes that the defendants seek. *Brady* does not require the government to turn over exculpatory evidence "if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987), *cert. denied*, 482 U.S. 929 (1987). The *Brady* rule is designed to "assure that the defendant will not be denied access to exculpatory evidence only *known to the Government*." *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982) (emphasis added), *cert. denied*, 459 U.S. 1174 (1983). The government must disclose only "information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988).

The cases cited by defendants do not alter this proposition. *United States v. Rodriguez*, relied on in defendants' briefs, stands for the proposition that when a defendant has no knowledge of certain *Brady* information, the government's disclosure must be "sufficiently specific and complete." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007). The *Rodriguez* Court specifically notes that this proposition is based on the fact that without the disclosure, "defendant was left to gamble on what witness would

say." *Id.* Similarly, in *Leka v. Portuondo*, the Court explicitly noted that "[e]vidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001).

Defendants knew of Rothenberger's existence, his role at Adelphia, and the facts on which he could testimony, thus, the government's *Brady* obligation was satisfied here. Defendants' own argument is underlied by their assertion that the government's identification of only one issue on which Rothenberger possessed exculpatory information "effectively nullified" their information on what his testimony would be. (Defs. Reply Br. at 6). This argument is flatly contradictory to the cases described above, which conclude that they government is not obligated to disclose information that defendants' already know, and thus defendants' argument fails. Defendants' only cases to support this argument, furthermore, are from other jurisdictions and therefore not controlling.[1]

Second, defendants argue that interview notes must be produced for a number of other witnesses based on the fact that these witnesses gave exculpatory testimony in the subsequent civil suit. However, defendants' brief in support of their Rule 33 motion documented their attempts to speak with these witnesses, and thus they cannot claim now that they were unaware of these witnesses' identities. As this Court noted in its November 20, 2007 Opinion, the

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[1] The two Supreme Court case defendants cite in footnote 6 of their reply brief are inapplicable here. Both deal with situations where the government complies with *Brady* under a specifically discussed "open file" policy, which did not occur here.

Rigases did not take any steps to procure testimony from these witnesses, such as seeking immunity for the witnesses or subpoenaing them, and thus cannot now backtrack and claim that they were unaware of these witnesses' identities. (*See* Opinion Nov. 20, 2007, p. 9-10). Thus, defendants' claims regarding other witnesses are denied.

Finally, defendants argue that they are entitled to notes from interviews conducted by the SEC during its civil investigation of the conduct at Adelphia. However, the United States Attorney's Office is not obligated to produce documents that are not within its "possession, custody, or control." Fed. R. Crim. P. 16(a)(1)(E). Here, there was no joint investigation with the SEC, and the United States Attorney's Office cannot be obligated to produce documents in the custody of the SEC. *SEC v. Standard*, 2007 WL 1834709, at *3 (S.D.N.Y. 2007) (noting that respective investigations by two government agencies, "while they may have overlapped, were not conducted jointly, and that the SEC has neither possession, custody, nor control of the FBI's notes."). Thus, defendants' argument fails with respect to this claim as well.

IV. Conclusion

For the reasons stated above, defendants' motion is DENIED.

SO ORDERED.

Dated: New York, New York
January 15, 2008

/s/ LEONARD B. SAND
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Cr. 1236 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants.

OPINION

SAND, District Judge.

Defendants John J. Rigas and Timothy J. Rigas have moved for a new trial pursuant to F.R. Crim. Proc. 33 on the grounds that "the government's central witness gave perjured testimony, without which the Rigases likely would not have been convicted." (Def. Mot. at 1). Defendants argue that testimony given by James Brown at civil proceedings held subsequent to the criminal trial demonstrate that Brown's testimony at the criminal trial was perjurious. In particular, defendants cite to passages of Brown's trial testimony relating to his dealings with Adelphia's outside auditors, Deloitte & Touche ("Deloitte") and his allegedly inconsistent testimony at subsequent SEC proceedings against one of Adelphia's auditors, Gregory Dearlove ("Dearlove") and the acquitted co-defendant, Michael Mulcahey.

The government opposes the motion on the grounds that Brown testified truthfully at the criminal trial, and asserts that the evidence is not newly discovered

and the jury's verdict would not have been different had it considered the allegedly conflicting testimony. We consider those issues herein.

I. Standard

The Second Circuit has stated that the test for granting a new trial based on newly discovered evidence is as follows:

> First, the motion will not be granted unless the newly discovered evidence could not with due diligence have been discovered before or during the trial . . . . Second when the newly discovered evidence focuses on the perjury of a witness, a threshold inquiry is whether the evidence demonstrates that the witness in fact committed perjury . . . . Third the newly discovered evidence must be material . . . . Fourth, consideration must also be given to whether the newly discovered evidence is cumulative, that is simply additional evidence to that which was presented at trial as to a fact, or unique evidence that tends to prove a fact at issue. [Fifth, the Court must consider] the effect the evidence would have on the jury's verdict had it been submitted at [the] trial."

United States v. Garcia, 2003 U.S. Dist. LEXIS 11894, *7-8 (S.D.N.Y. 2003) (citing *United States v. White*, 972 F.2d 16, 20-21 (2d Cir. 1992) (alterations in original).

Where the newly discovered evidence indicates possible perjury by a trial witness, the Court must first decide whether perjury has actually occurred. *See United States v. Torres*, 128 F.3d 38, 49 (2d Cir. 1997) ("In order to grant a new trial based on newly discovered evidence of trial perjury, the [defendants] must first demonstrate that the witness in fact com-

mitted perjury"). "A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory." *See United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993). "Simple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." *United States v. Sanchez*, 969 F.2d 1409, 1414-15 (2d Cir. 1992). However, "[e]ven where newly discovered evidence indicates perjury, motions for new trials should be granted only with great caution and in the most extraordinary circumstances." *United States v. Mason*, 201 Fed. Appx. 22 (2d Cir. 2006).

II. Alleged Perjury by James Brown

Defendants assert that "Brown's testimony was heavily concentrated on the Rigases' alleged efforts to mislead Adelphia's outside auditor Deloitte." (Def. Mot. at 15). The government characterizes this as being a "false straw man," and argues that it was not the government's claim nor Brown's testimony that he deliberately misled Deloitte on *all matters*. (Govt. Br. at 22).

Defendants offer the following contrast as proof of Brown's alleged perjury. First, they note that in his opening testimony, Brown stated that he lied "about a number of things," (Tr. 6070-71), and that in his concluding testimony, he answered "yes" to a cross examination question asking whether he had "lied . . . to banks and investment bankers and lawyers and accountants and sophisticated analysts and all kinds of people." Defendants argue that this testimony is inconsistent with the following testimony

Brown gave at the SEC proceeding against one of Adelphia's outside auditors:

Q: Did you lie to the auditors about the co-borrowing agreements and how the debt was reflected on the books and records of Adelphia and the Rigas entities?

A: No.

Q: Did you lie about the gross amounts of related party receivables and payables reflected on the books and records of Adelphia?

A: No.

Q: Did you lie about the existence of the cash management system?

A: No.

Q: Did you lie about debt reclassifications?

A: No.

Q: Or about direct placements of stock to the Rigases?

A: No.

* * *

Q: Did you direct any Adelphia employee to withhold any document requested by the engagement team relating to the co-borrowed debt?

A: No.

Q: Did you direct anyone to withhold documents relating to the gross amounts of related party receivables or payables as they were reflected on the books and records of Adelphia?

A: No.

Q: Did you direct anyone to withhold any documents relating to the debt reclassifications or the direct placements?

A: No.

Q: In connection with the 2000 audit, are you aware of any document that was [sic] withheld by any Adelphia employee relating to any of those items; specifically, the co-borrowed debt, the related party receivables, the direct placements, the debt reclassification?

A: No.

(Dearlove Tr. 84-85).

However, the government argues, and this Court agrees, that defendants' arguments are founded on the false premise that Brown testified that he had actively lied to Deloitte about every matter he discussed with them. Defendants contrast the broad statement at the criminal trial that Brown had lied to accountants with the questions at the SEC proceeding whether he had lied to Deloitte about certain specific matters. At the same SEC proceeding, when Brown was asked specific questions, he admitting lying to the auditors "about the EBITDA" and answered "yes" to the question of whether he "did things to deceive the auditors in the year 2000." (Dearlove Tr. 168). Furthermore, his testimony at the criminal trial was consistent with his SEC testimony, in that he stated that "the lies were a variety of formats. Some were just blatant falsehoods, some were half-truths, a lot of them were half-truths, and some of them were just withholding material information that would have been important to investors that made decisions." (Tr. 6071). Never at trial did Brown assert that he had deliberately, affirmatively lied to the auditors on *every* matter.

With respect to debt reclassification, Brown testified at the criminal trial that "[t]he auditors didn't

know about [the reclassifications]." (Tr. 6541-44). In the subsequent SEC proceeding, Brown testified that he did not lie about debt reclassification. (Dearlove Tr. 84). It is difficult to perceive how this testimony reflects perjury on Brown's part, let alone any suggestion that the government knew or should have known that Brown's testimony about the auditors' ignorance was false. (Def. Reply Br. at 16).

Without detailing all of the Defendant's allegations that Brown testified inconsistently at the criminal and civil proceedings, it suffices to say that the government has persuasively demonstrated that none of defendants' specific claims concerning Brown's testimony at subsequent civil proceedings supports the claim that his testimony in the criminal case was perjurious. (See Govt. Br. at 22-38). Several examples of defendants' alleged inconsistencies are discussed below, however, this list is not exhaustive. Ultimately, this Court is satisfied that the government did not claim, nor did Brown testify, that he personally lied to Deloitte about every one of the means by which the Rigases manipulated Adelphia's public disclosure to deceive the public. Accordingly, none of defendants' cited inconsistencies rises to the level of perjury. It is also worth noting, as the government points out, that Brown was not the sole witness to testify with respect to the defendants' fraudulent practices. *See e.g.*, testimony of Chris Tarner (Tr. 4377-87); James Helms (Tr. 4378-87).

i. *Debt Reclassification*

The trial testimony with respect to debt reclassification related to two different types of reclassifications: (1) reclassification effected by journal entries between the Rigas' managed enterprises ("RME's") and Adelphia; and (2) reclassification in connection

with certain purchases of Securities by Rigas entities. As to the second class of reclassifications, the testimony established that two other Adelphia employees, James Helms and Michael Mulcahy, made or directed making the relevant entries and Brown learned of them after they had been made. Viewed in this context, Brown's "never rang a bell with me" testimony, (Dearlove Tr. 159-60), is not indicative of prior perjury on his part.

ii. *Underwater*

Defendants cite Brown's trial testimony that for the periods 1999-2001 the Rigases were "underwater," (Crim Tr. 6585-86), as being perjurious in light of his testimony at the Dearlove and Mulcahy SEC hearings. (Def. Mot. at 18-19). However, as the government demonstrates, the defendants' comparisons conflate the question of whether Brown believed the Rigas family partnerships were underwater (comparing their total assets to their total liabilities) with the question of whether the Rigases had sufficient assets to pay their share of co-borrowed debt. (Govt. Br. at 33). At the Rigases' trial, Brown testified that a schedule he prepared in April 2002 showed an excess of Rigas family assets over co-borrowed debt. (Tr. 7249-82; Ex. 1600).

iii. *Immediate Available funds*

At the criminal trial, Brown testified that Adelphia's public disclosure represented that in exchange for the stock and bonds it sold to the Rigas family, Adelphia received "immediate available funds, which means cash." (Tr. 6732). Defendants contrast this testimony with Brown's testimony in the Mulcahy proceeding. In the Mulcahy proceeding, Brown was asked whether there was a difference to him "between cash and assumption of debt as a means of

purchasing securities." (Mulcahy Tr. 222). Brown responded that "I was generally aware that, to the auditors, it mattered if cash moved in numerous transactions." (Mulcahy Tr. 84-85) Brown's personal view of the meaning of "immediately available funds" and his understanding of how auditors would interpret that phrase hardly support a claim that Brown's trial testimony was perjurious.

iv. *Other Witnesses*

Defendants also cite inconsistencies between Brown's trial testimony and the testimony given at the post-trial SEC proceedings by other Adelphia employees. This testimony largely consists of the witnesses denying knowledge or complicity in transactions which Brown testified were a part of the defendants' concealment or misrepresentations. Putting aside the question (addressed below) of whether evidence of such testimony constitutes newly discovered evidence, the Court fails to see how such testimony is sufficient evidence to demonstrate that Brown testified perjuriously.

Finally, defendants argue that misleading statements made by a witness, even if not technically perjurious, can have the same effect on the jury as outright perjury. (Def. Reply. Br. at 4). The cases defendants cite for this proposition are not controlling within this jurisdiction, and the Court finds this argument wholly without merit. This Court will not reverse a conviction on the basis of perjury by a witness without finding that the witness did, in fact, commit perjury.

III. The Evidence Defendants Cite is Not Newly Discovered

The government also contends that the testimony relied on by the Rigases is not newly discovered evidence. Defendants argue, first, that because Brown's testimony in subsequent proceedings conflicts with his trial testimony, it should be considered newly discovered evidence. As discussed below, this argument can only succeed when the testimony in question demonstrates knowing, material perjury, which it does not do here. Further, defendants argue that because the certain witnesses "refused to cooperate with defense counsel before and during trial, despite counsel's efforts to secure their testimony, the witness' subsequent testimony in civil depositions should be considered newly discovered evidence." (Def. Mot. at 42). This argument is contrary to clear law in this jurisdiction, and therefore must fail.[1]

A. *Testimony from Brown*

The defendants assert that Brown's subsequent inconsistent testimony must be considered newly discovered "because it was not known at the time of trial that Brown eventually would have told the truth." (Def. Reply Br. at 34). However, defendants have failed to meet the predicate requirement for granting a new trial under Rule 33. "When the newly discovered evidence focuses on the perjury of a

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[1] Defendants also assert that even if their evidence is not newly discovered, it "is still highly relevant" to the Motion and "must be considered by the Court" because it demonstrates that Brown's criminal trial testimony was false. This proposition is simply incorrect. Under Rule 33, only newly discovered evidence may form the basis for a motion for a new trial, unless the motion is made within seven days of the verdict. *See* Fed. R. Civ. Pro. 33.

witness, a threshold inquiry is whether the evidence demonstrates that the witness in fact committed perjury." *United States v. White*, 972 F.2d 16, 20 (2d Cir. 1992).

As described herein, Brown's subsequent testimony does not adequately demonstrate that he committed knowing perjury during the Rigases' trial. *See Dunnigan*, 507 U.S. at 94 ("A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory").

B. *Testimony from Other Witnesses*

Defendants argue that, despite their diligence, the witness' refusal to cooperate rendered them unavailable before trial. However, the steps that defense counsel took to obtain these witnesses' testimony were insufficient. Courts have denied Rule 33 motions where the defendant "has produced no evidence of any attempts to subpoena either co-defendant before or during trial," see *United States v. Cruz*, 602 F. Supp. 825, 833 (S.D.N.Y. 1985), or "to request that the government grant them immunity," *United States v. Matos*, 781 F. Supp. 273, 279-280 (S.D.N.Y. 1991). Although defense counsel attempted to communicate with these witnesses voluntarily, neither of these steps was taken.

Similarly, defendants claim that the government's Bill of Particulars and a memorandum from Adelphia's legal department both had a "chilling effect" and precluded defense counsel from obtaining statements from a number of witnesses. Again, defense counsel does not allege that these witnesses would have defied a federal subpoena had they been called to testify at trial. Tellingly, one witness even told

defense counsel that he would not "say anything without a subpoena." (Def. Mot. at 46). Defendants' choice not to pursue this testimony was a strategic decision, and cannot now form the basis for a new trial.[2]

Defendants contend that counsel could not have been required to subpoena all possible witnesses, or to "call all of those individuals to the stand without any indication of what they would say or whether they had any relevant information at all." (Def. Br. at 43). However, this argument has been squarely rejected by prior courts. *See Matos*, 781 F. Supp. at 279-280 ("The precise testimony of any potential witness cannot be known until it is had . . . The decision not to interview [a witness], and not to call [a] witness, whether wise or not, was a deliberate and strategic one. The defendant is not entitled to a new trial so that he may employ a different strategy.") (citing *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978)). Defendants concede that the decision not to call these witnesses was a conscious and deliberate decision, "discussed among counsel and with at least

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[2] The Second Circuit recently addressed whether testimony by an alleged co-conspirator, who refused to testify pursuant to his fifth amendment privilege against self-incrimination, could be considered "newly discovered" if the co-conspirator's testimony was made available after the trial. The Court joined the majority of circuits to consider this issue, and held that a new trial could not be ordered "on the basis of evidence that was known by the defendant prior to trial, but became newly available after trial." *United States v. Owen*, 500 F.3d 83, 89 (2d Cir. 2007). Accordingly, "Rule 33 does not authorize district courts to grant new trials on the basis of such evidence since it is not newly discovered, but merely newly available." *Id.* Evidence of testimony from witnesses who were identified as potential trial witnesses by the government is newly available, not newly discovered.

Tim and John Rigas." (Flemming Aff. at 8). Because the testimony that defendants cite could have been available if defendants had subpoenaed these witnesses at the time of trial, there is no newly discovered evidence within the meaning of Rule 33.

IV. Impact on Verdict

We conclude that in the context of the entire trial and considering the challenged testimony in its entirety, rather than as isolated and inapposite comparisons of Brown's testimony at trial with subsequent testimony as to different and more specific questions, the jury's verdict would not have been different had it considered the allegedly conflicting testimony.

IV. Conclusion

For the reasons stated above, defendants' motion for a new trial is DENIED.

SO ORDERED.

Dated: New York, New York
November 20, 2007

/s/ LEONARD B. SAND
U.S.D.J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 05-3577-cr(L), 05-3589-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

v.

TIMOTHY J. RIGAS AND JOHN J. RIGAS,
Defendants-Appellants.

Argued: June 14, 2006

Decided: May 24, 2007

Before: MESKILL, CABRANES, and WESLEY, Circuit Judges.

WESLEY, Circuit Judge.

Defendants Timothy J. Rigas and John J. Rigas ("Defendants") appeal from a judgment of conviction following a jury trial in the United States District Court for the Southern District of New York (Sand, J.). Defendants were convicted of conspiracy to commit securities fraud, conspiracy to make and cause to be made false statements in filings with the SEC, and conspiracy to commit bank fraud under 18 U.S.C. § 371 (Count One);[1] securities fraud under

[1] We note that there appears to be some inconsistency in the record regarding the jury's verdict on this Count. The transcript of the trial reflects that the jury found both Timothy Rigas and John Rigas guilty of conspiracy to commit securities

15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2 (Counts Two through Sixteen); and bank fraud under 18 U.S.C. § 1344 (Counts Twenty-Two and Twenty-Three).

Defendants make four claims on appeal: (1) the government should have been required to present evidence that Defendants violated Generally Accepted Accounting Principles ("GAAP") and to call an accounting expert; (2) government witness Robert DiBella improperly gave expert accounting testimony; (3) the bank fraud convictions should be vacated because the indictment was constructively amended or they should be reversed because there was insufficient evidence for the jury to find that any misrepresentations to the bank were "material"; and (4) Defendants were prejudiced by the improper admission of uncharged crime evidence, which also constituted a constructive amendment of the indictment.

For the reasons set forth below, we affirm the judgments of conviction on all Counts except Count Twenty-Three. We reverse Defendants' conviction on Count Twenty-Three, and we remand for an entry of

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fraud, conspiracy to make and cause to be made false statements in filings with the SEC, and conspiracy to commit bank fraud, and it found them not guilty of conspiracy to commit wire fraud. It was undecided on conspiracy to falsify books and records of a public corporation. The judgment for Timothy Rigas, however, recites that the jury found him guilty of "[c]onspiracy to commit securities fraud, wire fraud, making false statements." John Rigas's judgment states he was found guilty of "[c]onspiracy to commit securities fraud, wire fraud, making false statements and bank fraud." The parties may address any arguments regarding the consequences of these inconsistencies to the district court in the first instance.

a judgment of acquittal on this Count and for re sentencing.

BACKGROUND

Adelphia Communications Company ("Adelphia") announced its 2001 Fourth Quarter and Full-Year results in a March 27, 2002 press release. In a footnote on the final page of that press release, Adelphia, at the recommendation of its accounting firm, Deloitte & Touche, first disclosed publicly that it had approximately $2.2 billion in liabilities not previously reported on its balance sheet.[2] On the day of disclosure, Adelphia's stock price plummeted by about twenty-five percent to $20.39; by the time the stock was delisted in May 2002, the price per share was $1.16. The company filed for bankruptcy in June 2002, wiping out all shareholder value. A

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[2] The footnote read as follows (dollar amounts are in thousands):

> Certain subsidiaries of the Company are co-borrowers with certain companies owned by the Rigas Family and managed by the Company ("Managed Entities") for borrowing amounts of up to $5,630,000. Each of the co-borrowers is liable for all borrowings under the credit facilities and may borrow up to the full amount of the facilities. Amounts borrowed under these facilities by the Company's subsidiaries are included as debt on the Company's consolidated balance sheet. Amounts borrowed by Managed Entities under the facilities are not included in the Company's consolidated balance sheet. The Company expects the Managed Entities to repay their borrowings in the ordinary course. The Company does not expect that it will need to repay the amounts borrowed by the Managed Entities. As of December 31, 2001, co-borrowing credit facilities balances, net of amounts otherwise reflected as debt on the Company's consolidated balance sheet, totaled approximately $2,284,000. The related maturities of these amounts are as follows: approximately $0 in 2002, $26,000 in 2003 to 2005, $519,000 in 2006 and $1,739,000 thereafter.

month later, John Rigas, his sons Michael and Timothy, and two other Adelphia employees were arrested and charged with looting the company.

The Story of Adelphia

Adelphia, one of the largest cable television providers in the country before its bankruptcy, had modest beginnings. In the early 1950s, John Rigas, the son of Greek immigrants, borrowed money from his family to buy a movie theater in Coudersport, a small town about twenty miles south of the New York-Pennsylvania state line. In 1952, he purchased the rights to wire the town for cable television. By the time John Rigas's sons Michael and Timothy joined Adelphia in the mid-1980s, the privately owned company boasted hundreds of thousands of cable subscribers.

In 1986, John Rigas took Adelphia public. Adelphia issued two classes of common stock: Class A, with one vote per share, and Class B, with 10 votes per share. The Rigas family owned almost all of the Class B shares, and, as a result, was able to maintain control of the company and the Board of Directors. Indeed, Rigas family members filled many of the top positions in Adelphia. John Rigas was Adelphia's President, Chairman of the Board, and Chief Executive Officer until he resigned in May 2002. Timothy Rigas served as Board member, Executive Vice President, and Chief Financial Officer. Michael Rigas was also on Adelphia's Board and was Executive Vice President for Operations. Another son, James, filled out the Rigases' majority control of the seven-member Board of Directors. Peter Venetis, John Rigas's son-in-law, was added to the Board when it expanded to nine members.

Not all of the companies controlled by the Rigas family went public when Adelphia did. Rather, Adelphia managed some of the cable companies – the Rigas Managed Entities ("RMEs")[3] – that the family continued to own privately. Adelphia's management of the RMEs was disclosed in public filings; however, Adelphia did not disclose the amount of the fees charged to, or paid by, the RMEs, or that cash generated from the RMEs was commingled with that generated by Adelphia. Certain transactions between Adelphia and the RMEs were at issue during the trial; the government argued that Defendants utilized the Adelphia-RMEs business arrangement to effect and conceal aspects of their frauds.

Adelphia's business during the time relevant to this case was "cash flow negative." That is, it did not generate enough cash revenue from subscriber fees to pay for its capital expenditures, interest payments, and cost of operations. Adelphia's capital expenditures included $1.5 to $2 billion per year to update its cable systems to higher bandwidth and two-way communication capabilities (the "Rebuild Plan"). Between 1998 and 2002, Adelphia paid approximately $5.2 billion in cash and issued more than 72 million new shares of Class A common stock to acquire other cable entities in an effort to lower costs as a result of operating efficiencies (the "Acquisition Plan"). Banks and holders of Adelphia stocks and bonds watched as Adelphia's leverage ratios climbed. Indeed, as Moody's Investors Service noted in August

[3] Other Rigas family-owned entities operated merely to hold securities beneficially owned by the family; they will be referred to as the Rigas Non-Cable Entities ("RNCEs"). The RMEs and RNCEs are together referred to as the Rigas Family Enterprises ("RFEs").

2001, Adelphia was "one of the most highly leveraged companies in the cable sector."

Adelphia set about raising sufficient capital to offset its annual operating losses, to fund the Rebuild and Acquisition Plans, and to pay down increasing interest expenses. This new cash mainly came from $4.9 billion in public sales of newly issued common and preferred stock, $4.4 billion in public sales of notes and convertible debentures, and bank loans.

Adelphia's disclosed bank borrowings were $5.4 billion in September 2001, more than a six-fold increase from March 1998. Generally, each separate bank loan was entered into by a group of Adelphia subsidiaries that pledged their assets as collateral; the group was referred to as a "borrowing group." Certain bank loans were set up through a "co-borrowing" arrangement (the "Co-Borrowing Arrangement") between the RMEs and Adelphia subsidiaries. Timothy Rigas proposed the Co-Borrowing Arrangement to the Adelphia Board in 1999, and argued it would lower borrowing costs and prevent competition for bank financing between the RMEs and Adelphia entities. Under this Co-Borrowing Arrangement and at the Rigases' direction, Adelphia entered into three separate "Co-Borrowing Agreements" – loans for which the RMEs and Adelphia subsidiaries were jointly and severally liable. These Co-Borrowing Agreements totaled about $5.5 billion. Adelphia's accounting firm, Deloitte & Touche, reviewed and approved the manner in which Adelphia disclosed and accounted for the co-borrowed debt on its public financial statements.

The Rigas family wished not only to expand Adelphia, but also to maintain control over the company, in part because Adelphia's loan agreements provided

that the Rigases' loss of voting control would constitute default. To maintain family control, every sale of stock to the public required a concurrent sale of stock to the Rigases. Arguing that their stock purchases represented the family's "public vote of confidence" in Adelphia "because in addition to selling shares to the public, they were buying new shares, that is, they were investing fresh money of their own into the company," Timothy Rigas persuaded the Adelphia board to sell Class B shares to the Rigas family with each new offering to the public.[4] During the relevant time, family members purchased $1.6 billion in new shares.

The Charged Conduct

Timothy Rigas and John Rigas were charged with conspiracy to commit securities fraud, to commit wire fraud, to make and cause to be made false statements in filings with the SEC, to falsify the books and records of a public corporation, and to commit bank fraud under 18 U.S.C. § 371 (Count One); securities fraud under 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2 (Counts Two through Sixteen); wire fraud under 18 U.S.C. § 1341 (Counts Seventeen through Twenty-One); and bank fraud under 18 U.S.C. § 1344 (Counts Twenty-Two and Twenty-Three). The conduct underlying these charges, as set forth in the Superseding Indictment and the government's case at trial, is summarized below.

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[4] Defendants continue to press the same views on appeal and also assert they were acting on the advice of investment advisors with only the best intentions of Adelphia in mind. We do not think these arguments preclude Defendants' criminal liability.

I. The Rigas Family's Fraudulent Stock Purchases

The Rigases did not have enough cash to provide the promised "fresh money" for the shares they purchased to maintain control over Adelphia. The steps they took to purchase these shares constitute several of the charged frauds. The purchase agreements for the stocks required that at the closing date, the Rigases "shall deliver to the Company the purchase price for the Shares in immediately available funds"; Adelphia's public filings and press releases suggested to investors and analysts that the Rigases had paid cash for the stocks. However, this was not the case. Instead, for the earlier purchases, Defendants borrowed funds to pay Adelphia, but then caused Adelphia to use that cash to pay off other family debts. For the later purchases, Defendants caused Adelphia to "move" debt it owed under the Co-Borrowing Agreements from its books to the books of one of the RMEs. The process of moving debt from Adelphia's financial statement to one of the RMEs' financial statements was called "reclassification," and the debt, itself, was referred to as having been "reclassified."

As the government argued at trial, even if the RMEs had assumed Adelphia's debts, Adelphia was worse off than if the Rigases had paid cash and Adelphia paid down its existing borrowings. When the Rigases assumed debt from Adelphia under one of the Co-Borrowing Agreements, Adelphia's capital funding strategy was adversely affected in two ways: first, Adelphia would still be liable for those debts because the Co-Borrowing Agreements provided for joint and several liability, and second, had the Rigases paid cash, those funds could have been used to pay

down the debts on the Co Borrowing Agreements, thus freeing up the credit available for Adelphia. Most importantly, the Rigases misrepresented that they paid cash for the stocks, raising the necessary funds from margin loans, from leveraging their private cable properties, and from outside investors, and that this cash would be used to pay down debts.

The government introduced evidence supporting its allegations that Defendants engaged in fraudulent securities purchases through, *inter alia*, the testimony of former members of Adelphia's Board, the stock purchase agreements, bank records, general ledger journal entries relating to the sales, and borrowing and paydown notices for the bank creditors.

II. The Transfers of the Co-Borrowing Debt

The government also alleged that Defendants masked other debts that the Rigas family, the RMEs, and the RNCEs owed to Adelphia. Defendants accomplished this by reporting all the amounts the RMEs and RNCEs owed Adelphia as a single "related party receivable," which they reported on a net basis – that is, Adelphia's financial statements did not itemize the amounts owed by each of the RFEs, but instead listed a single figure which "netted" all the payables and receivables related to the RFEs on a combined basis. The reclassification scheme used to effectuate the stock sales described above also contributed to this concealment.

By reporting the amounts owed as a related party receivable, Defendants masked both the actual amount of cash advanced to the RMEs and the RNCEs and the fact that the cash was advanced to RNCEs that Adelphia did not manage. Once this net related party receivable reached $200 million, Vice President of Finance James Brown and Timothy

Rigas discussed masking the size of the receivables by moving debt from Adelphia's books to the RMEs' books. As an example, Adelphia might move $20 million of debt owed to the banks under the Co-Borrowing Agreements to an RME's books; Adelphia would then credit the RME with the $20 million assumption of debt, thus decreasing the amount the RME owed Adelphia by $20 million. Brown testified that this arrangement provided no benefit to the Adelphia shareholders, but merely avoided disclosing on Adelphia's books the high net receivable balance from the RMEs. After the first reclassification of over $200 million, additional debt was reclassified on a quarterly basis. In total, the Rigases reclassified over $2.8 billion dollars worth of debt, including the stock purchase reclassifications, from the first quarter of 2000 until the end of the conspiracy.

These reclassifications were memorialized only in general ledger journal entries; neither Adelphia nor the RMEs executed formal assumption agreements. As the reclassified funds had been borrowed under the Co-Borrowing Agreements, Adelphia would still be liable for the full amount due if the RMEs were unable to pay the debt. The government argued, and the jury apparently agreed, that these ledger entries were fraudulent and intended to mislead stockholders and analysts about the debt the Rigas family and the RFEs owed to Adelphia.

III. Fraud Regarding Adelphia's Operating Performance

The government also alleged that Defendants misrepresented three key indices of Adelphia's performance: (1) its basic cable subscriber growth; (2) its success in rebuilding its cable systems; and (3) its pro forma earnings, measured in terms of "Earnings

Before Interest, Taxes, Depreciation, and Amortization" ("EBITDA").[5] These misrepresentations allowed Adelphia to appease investors and comply with covenants under its bond indentures, and they affected indices used to set interest rates under its various bank loans. They were disseminated to the public through Adelphia's SEC filings and quarterly press releases, and through conference calls, conferences, and "road shows" with investors. Given Adelphia's rapid expansion, and the associated cash flow deficits, investors were paying particularly close attention to the indices Adelphia manipulated.

a. Misleading Cable Subscriber Growth

The government provided proof that Adelphia distributed materially misleading cable subscriber growth numbers to the public from 2000 to 2002. Timothy Rigas directed or approved fraudulent quarterly earnings press releases, and John Rigas knew of and approved them. Karen Chrosniak, Adelphia's Director of Investor Relations, testified that Timothy Rigas and others directed her to add subscribers to the earnings releases to artificially increase Adelphia's reported basic subscriber growth rate.[6]

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[5] EBITDA is calculated by subtracting operating expenses from operating revenue. Also excluded from EBITDA calculations are (1) other current expenses, such as interest and taxes, and (2) non-cash expenses such as depreciation. An increase in a company's interest expenses will not lower its EBITDA, and capital expenses do not immediately affect a company's EBITDA

[6] Adelphia's annual reports stated that "[a] home with one or more television sets connected to a cable system is counted as one basic subscriber." Other subscriber categories included "digital subscribers" (homes with television sets that subscribed to digital cable services at a premium rate) and "Powerlink subscribers" (homes that subscribed to Adelphia's internet service).

The government argued that Timothy Rigas directed the fraudulent inflation of Adelphia's basic subscriber number and basic subscriber growth rate by adding, in 2000, subscribers from companies in Brazil and Venezuela in which Adelphia owned an interest. The government contended that including the subscribers artificially increased Adelphia's reported pro forma basic subscriber growth rate. The third quarter 2001 report was also increased, again at Timothy Rigas's instruction, to include 60,000 home security system subscribers, even though the home security subscribers were tallied separately from the cable subscribers and those home security subscribers who also had cable would, in effect, be double counted. Finally, after he learned that his projections to analysts had fallen short, Timothy Rigas instructed Chrosniak to inflate the 2001 year-end number of subscribers to the Powerlink internet service by including 7,000 "pending installs" – subscribers who had signed up for service but not yet started making payments to Adelphia as the service had not yet been installed – as actual subscribers. As a result of the fraudulent increases in subscriber growth rates, the year-end 2000 subscriber growth rate was reported as 1.3 percent and the year-end 2001 figure was reported as 0.5 percent. The actual figures were 0.5 percent and negative 1.2 percent.

b. Misrepresentations about the Rebuild Program

Adelphia expended between $1.5 and $2 billion annually to rebuild its cable system to provide digital cable and high speed internet access to its subscribers. As this enhanced technology was critical to the company's long-term health and the annual expenditures on it were substantial, investors closely

followed the status of the Rebuild Program. But they were misled by Timothy Rigas, who, during road shows, investor conferences, and shareholders' meetings, fraudulently overstated the percentage of Adelphia's systems that had been upgraded to higher bandwidth and two-way communication capabilities. Adelphia also gave these inflated numbers to its bank lenders.

c. Adelphia's Inflated EBITDA

Several witnesses testified that investors commonly use EBITDA to assess the earnings from operations of cable companies. Brown testified that he told John Rigas Adelphia's real EBITDA and how it compared with its competitors' results. Brown also told John Rigas what would happen if Adelphia reported the actual EBITDA: Adelphia would default on some of its public debt, its stock price could decline, and its interest expenses and the cost of borrowing from banks would increase. While John Rigas told Brown that Adelphia "needed to get away" from using what Brown described as "accounting magic" to manipulate the numbers, he never told Brown to stop manipulating the numbers.

The "accounting magic" used to manipulate EBITDA comprised two schemes: (1) fraudulent allocations of management fees that the RMEs owed to Adelphia and (2) "wash transactions" with Adelphia's suppliers.[7] Brown explained that he would arbitrarily inflate the management fees that an RME owed to

[7] The wash transactions were, as Brown testified, "business transactions that were recorded that would affect one side of the company's ledger in a way that would benefit the EBITDA number and make it higher and . . . would lower something else that investors won't look at but that had no net economic impact on the company at all . . . ."

Adelphia, and then record a corresponding interest expense that Adelphia "owed" the RME. The interest expense would ensure that there was no real cost to the RME as a result of the scheme but, because it was interest, it would not be included in Adelphia's EBITDA. As a result, then, this scheme – which Timothy Rigas "went along with" – artificially inflated Adelphia's EBITDA.

In his testimony about the wash transactions, Brown indicated that Timothy Rigas discussed, and then implemented, schemes with two separate equipment suppliers, Motorola and Scientific Atlanta. The effect of the wash transaction schemes was to increase Adelphia's EBITDA by $87.1 million. In these schemes, Adelphia increased the price it paid to Motorola and Scientific Atlanta for digital converter boxes, and Motorola and Scientific Atlanta agreed to pay Adelphia the amount of the increase for advertising and market support. Because the payments to the equipment suppliers were booked as capital expenses, and the payments from the suppliers were booked as revenue, this scheme artificially inflated the EBITDA.[8] According to Brown, Timothy Rigas instructed him to book nearly $20 million in increased

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[8] For example, Adelphia agreed to pay Scientific Atlanta $339 for each cable converter box. The two entities later agreed that Scientific Atlanta would increase the price of each box by $31, and Adelphia would charge an identical $31 per box for marketing support. Thus, Adelphia's capital expenses for each box were increased by $31 to $370. But Adelphia's current expenses were decreased, and its EBITDA was increased, by $31 per box. The effects of the marketing support scheme in the June 2000 and September 2000 quarters, for example, were an increase in Adelphia's EBITDA of $7 million and $12.8 million, respectively. The scheme with Motorola was similar, and had the same EBITDA-inflating effect.

advertising revenue even before the two equipment suppliers agreed to the wash transaction scheme; Adelphia never provided any advertising services for these suppliers.

IV. The Scheme to Defraud Adelphia's Bank Lenders

The jury convicted Timothy and John Rigas of conspiracy to commit bank fraud and two substantive counts of bank fraud related to two of the three Co-Borrowing Agreements.[9] The Co-Borrowing Agreements[10] required minimum leverage ratios of debt to EBITDA[11] and tied interest rates to this leverage ratio. The government argued to the jury that the EBITDA manipulations resulted in lower interest payments to the banks than if the EBITDA had been accurately reported. The EBITDA manipulations were carried out at the level of the Adelphia parent company as described above. In addition, when Brown, Timothy Rigas, and Michael Mulcahey (a co-defendant of the Rigases who was Adelphia's Assistant Treasurer) determined that the EBITDA of particular borrowing groups (the Adelphia and RME

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[9] The three Co-Borrowing Agreements, which provided a total maximum borrowing capacity of about $5.5 billion, were: (1) the Hilton Head Communications and UCA Corp. ("UCA") Facility; (2) the Century ("CCH") Facility, and (3) the Olympus ("OCH") Facility. Counts Twenty-Two and Twenty-Three of the Superseding Indictment charged Defendants with bank fraud regarding the CCH Facility and the OCH Facility.

[10] The direct borrowers on the Co-Borrowing Agreements were Adelphia subsidiaries and a few of the RMEs. The manipulations of Adelphia's EBITDA "trickled down" to the subsidiaries' financial statements.

[11] The leverage ratio was calculated by dividing the borrower's indebtedness by annual operating cash flow.

entities in each Co-Borrowing Agreement) was not high enough, expenses would be moved between the subsidiaries and affiliate or interest income would be transferred from one internal company to another.

V. Looting from Adelphia's Cash Management System

The evidence at trial showed that throughout the period of the conspiracy, Defendants took over $200 million dollars from Adelphia's Cash Management System for personal expenses ranging from $200 to purchase 100 pairs of bedroom slippers for Timothy Rigas, to over $3 million to produce a film by Ellen Rigas, to $200 million to pay off Rigas family margin loans. The missing money was obscured by the commingling of cash between Adelphia and the RMEs and the RNCEs.[12] Cash transfers for the benefit of the Rigas family needed only to be approved by a member of the Rigas family or James Brown. No promissory notes were ever signed in favor of Adelphia, and, in some instances, personal expenses were falsely recorded as Adelphia's expenses. Timothy Rigas also unilaterally changed the price allocation approved by Adelphia's Board of Directors regarding the co-purchase of certain cable systems; he shifted an extra $50 million of the purchase price from the RFEs to Adelphia without informing Adelphia's independent directors. The cash transfers to the Rigas family were not reported as compensation or loans, as required by the SEC, or disclosed to investors as related party transactions.

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[12] As the district court made clear to the jury, the government did not contend that "that there [was] anything inherently wrong or unlawful with a cash management system, with a co-borrowing, or commingling." Instead, the failure to properly disclose information was the fraudulent conduct.

Adelphia's financial statements and annual reports did little to apprise shareholders of what the Rigas family owed Adelphia. All related party transactions between Adelphia and the Rigas family and the RNCEs were combined and "netted out" against transactions with the RMEs, which obscured what the Rigas family actually owed Adelphia.

DiBella's Testimony

Robert DiBella reviewed and analyzed Adelphia's accounting records from December 31, 1988 through April 30, 2002 and testified extensively about a summary chart, Government Exhibit 101, prepared with data retrieved from Adelphia's general ledger, journal entries, and other supporting documents to "summarize the affiliate receivable transactions between Adelphia and certain of the Rigas entities." He totaled the cash that flowed into the Cash Management System from the RMEs and the RNCEs and then deducted the payments made on behalf of the RMEs and the RNCEs. The result was that there were net receivables due to Adelphia from the Rigas entities of $54.9 million, $164.7 million, $10.5 million, $39.9 million, and $386 million for the years 1998 through 2002. But, the government argued, even these numbers underrepresented – by over $2.8 billion – the actual debt that the Rigas family owed Adelphia because of the debt reclassification scheme described above. The reclassification scheme was included on Government Exhibit 101, and DiBella explained to the jury that, while the net receivable to Adelphia with the debt reclassifications was $386 million, it would have been around $3.2 billion without the reclassifications.

The Defense Case

Timothy Rigas called no witness, and John Rigas called a character witness and two lawyers who testified that a government witness had made a prior statement that was inconsistent with his trial testimony.

The Verdict

After a four and a half month trial, the testimony of twenty witnesses, and the submission of hundreds of exhibits, the jury found John and Timothy Rigas guilty of conspiracy to commit securities fraud, conspiracy to make and cause to be made false statements in filings with the SEC, and conspiracy to commit bank fraud under 18 U.S.C. § 371; securities fraud under 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2; and bank fraud under 18 U.S.C. § 1344. John Rigas, Timothy Rigas, and Michael Rigas were acquitted of wire fraud and conspiracy to commit wire fraud. The jury acquitted Michael Mulcahey of all charges and acquitted Michael Rigas of the conspiracy and wire fraud counts; the jury was undecided as to the remaining counts against Michael Rigas. John Rigas and Timothy Rigas remain free on bail.

Discussion

The Government Was Not Required to Prove Defendants Violated GAAP or to Call an Accounting Expert

Defendants challenge their convictions for conspiracy under 18 U.S.C. § 371 (Count One) and securities fraud under 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5; and 18 U.S.C. § 2 (Counts Two through Sixteen), on the grounds that the prosecution should have been required to call an accounting expert to

familiarize the jury with GAAP.[13] Specifically, they contend that Financial Accounting Statement ("FAS") Number 5 ("FAS 5") by the Financial Accounting Standards Board ("FASB") applies to the Co-Borrowing Agreements that formed the basis for the securities fraud conviction, and that the government was required to introduce FAS 5 and an accounting expert to explain it.[14] We conclude that the government was not required to present this evidence.

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[13] GAAP "are the official standards adopted by the American Institute of Certified Public Accountants . . . ." *United States v. Ebbers*, 458 F.3d 110, 125 n. 2 (2d Cir.2006) (citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 160 n. 4 (2d Cir.2000)), *cert. denied*, 549 U.S. 1274, 127 S.Ct. 1483, 167 L.Ed.2d 244 (2007).

[14] FAS 5, dealing with accounting for contingencies, reads in relevant part:

> 1. For the purpose of this Statement, a contingency is defined as an existing condition, situation, or set of circumstances involving uncertainty as to possible gain ["gain contingency"] or loss ["loss contingency"]
>
> . . .
>
> 3. When a loss contingency exists, the likelihood that the future event or events will confirm the loss or impairment of an asset or the incurrence of a liability can range from probable to remote . . . .
>
> a. *Probable*. The future event or events are likely to occur.
>
> b. *Reasonably possible*. The chance of the future event or events occurring is more that remote but less than likely.
>
> c. *Remote*. The chance of the future event or events occurring is slight.
>
> 4. Examples of loss contingencies include:
>
> . . .
>
> h. Guarantees of indebtedness of others.
>
> i. Obligations of commercial banks under "standby letters of credit."

Defendants wisely do not argue that the prosecution was required to prove that they violated GAAP to establish that they committed securities fraud. It has been the long-held view in this Circuit that GAAP neither establishes nor shields guilt in a securities fraud case. *United States v. Simon*, 425 F.2d 796, 805-06 (2d Cir.1969) (Friendly, J.). Making GAAP compliance determinative of securities fraud charges would require jurors to "accept the accountants' evaluation whether a given fact was material to overall fair presentation" – a proposition this Court rejected in *Simon*. *Id.* at 806. Instead, compliance with GAAP is relevant only as evidence of whether a defendant acted in good faith. *Id.* at 805.

Simon was recently, and unequivocally, reaffirmed by this Court in *United States v. Ebbers*, 458 F.3d 110 (2d Cir.2006). In *Ebbers*, we held that "GAAP may have relevance in that a defendant's good faith attempt to comply with GAAP or reliance upon an accountant's advice regarding GAAP may negate the government's claim of an intent to deceive," *id.* at 125 (citing *Simon*, 425 F.2d at 805), but that even when "improper accounting is alleged," we look to the statute to determine what the government must prove. *Id.*

Defendants argue that *Simon* should apply only to cases where no specific accounting provision speaks to the alleged accounting malfeasance. They base this argument on language from *Simon* that notes accountants' evaluations do not bind a jury, "at least not when the accountants' testimony was not based on specific rules or prohibitions to which they could point. . . ." *Simon*, 425 F.2d at 806. They contend that because FAS 5 applies to their situation, the district court should have required the prosecution

to prove non-compliance, or, at the very least, offer expert testimony on the subject.

Defendants are wrong. The government was not required to present expert testimony about GAAP's requirements because these requirements are not essential to the securities fraud alleged here. *See Ebbers*, 458 F.3d at 125. A single reference to GAAP in the Superseding Indictment[15] does not change that conclusion, and the district court properly instructed the jury on the elements of securities fraud and conspiracy to commit securities fraud. *See United States v. Miller*, 471 U.S. 130, 144, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (holding that courts may ignore "independent and unnecessary allegations in the indictments"). The jury heard testimony that the debt reclassifications were specifically designed to mislead investors about the amount of money the Rigas family and their other companies owed Adelphia, and it could have reasonably found that Defendants committed fraud. Even if Defendants complied with GAAP, a jury could have found, as the jury did here, that Defendants intentionally misled investors. Defendants reclassified debt owed under the Co Borrowing Agreements – for which Adelphia remained jointly and severally liable – rather than paying for the securities they purchased from Adelphia in "immediately available funds." This reclassified debt also reduced the amount of money that Adelphia

[15] Paragraph 67, related primarily to the securities fraud charge, reads as follows: "Pursuant to GAAP, Adelphia was required, among other things, to disclose the full amount of its joint and several liabilities under the Co-Borrowing Agreements in the notes accompanying its financial statements."

could borrow under the Co-Borrowing Agreements.[16] As a result, the jury could find that investors were misled into believing that Adelphia had been infused with more cash,[17] when, in reality, debt for which Adelphia remained jointly and severally liable was moved onto the RMEs' books. Whether the reclassification was permitted under GAAP was not the issue.

In *Ebbers*, we also foreclosed Defendants' argument that the court should have required the prosecution to call expert witnesses to testify regarding GAAP and, specifically, FAS 5: "'The government is not required in addition to prevail in a battle of expert witnesses over the application of individual GAAP rules.'" 458 F.3d at 125-26. While Defendants are correct that the district court opined that an expert

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[16] In its closing argument, the government analogized a Co-Borrowing Agreement to a brother and sister obtaining a joint credit card with a $10,000 credit limit. If the brother uses a cash advance of $5,000 from the credit card to purchase a car from his sister, but does not reveal the source of the money, the sister is "not any better off for having sold [her] car to [her] brother." She is liable to the credit card company for the $5,000 used by her brother to buy the car, and her credit limit has been reduced by that $5,000.

[17] Defendants represented to this Court at oral argument that the Co-Borrowing entity that assumed the reclassified debt would not have to pay that debt until it became due. This fact undercuts Defendant's claim that the reclassification was tantamount to "immediately available funds." Even if the RMEs' assumption of this reclassified debt was, as Defendants argue, legitimate, it is clear that Adelphia was not put in the same place as it would been had the RMEs paid it, as the records erroneously reflected, with immediately available funds. The reclassified debts were not immediately due; any assumption of repayment freed up no new funds for Adelphia but, in Defendants' best argument, made the RMEs the primary obligor when that debt came due, sometime in the future.

might be helpful, the prosecution apparently thought it could explain the alleged fraud through the testimony of other witnesses – including James Brown, Adelphia's former Vice President of Finance, and James Helms, an accountant/manager in Adelphia's treasury department – with sufficient clarity to garner a conviction. The district court did not err by not requiring the prosecution to call accounting experts.

Finally, in a letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), Defendants contend that *United States v. Lake*, 472 F.3d 1247 (10th Cir.2007), supports their argument. The defendants in *Lake* were indicted for, *inter alia*, filing false 10K reports with the SEC because those reports failed to disclose the value of their personal use of corporate aircraft. *Id.* at 1253-54. "Highly pertinent" to the jury's assessment of whether the *Lake* defendants acted with wrongful intent in failing to disclose their use of the company planes was "whether the personal use had to be reported to the SEC." *Id.* at 1253. The SEC required disclosure only if the "aggregate incremental cost" exceeded a certain threshold. *Id.* Because the government did not show that the SEC required disclosure of the aircraft use, there was no "evidence from which the jury could infer beyond a reasonable doubt that any of the reports wired to the SEC was false, fraudulent, or even misleading." *Id.* at 1258, 1260.

Defendants argue that *Lake*'s endorsement of the SEC standards for disclosure compels us to find that the government should have provided GAAP disclosure standards here. GAAP rules do not govern whether Adelphia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent,

and a violation of GAAP is not an element of the offenses charged. Because Defendants' guilt does not turn on whether Adelphia's accounting statements complied with GAAP, *Lake* is inapposite.

DiBella Did Not Present Expert Opinion Testimony

Defendants assert that government witness Robert DiBella improperly offered expert opinion testimony. In our view, DiBella's testimony was properly admitted.

A district court's decision to admit evidence is reviewed for abuse of discretion. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 174 n. 1, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir.2005). Even if evidence is improperly admitted, reversal is warranted only if an error affects a "substantial right," Fed.R.Evid. 103(a) – that is, if the error had a "substantial and injurious effect or influence" on the jury's verdict. *United States v. Dukagjini*, 326 F.3d 45, 62 (2d Cir. 2003) (internal quotation marks omitted); *see also United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004); *Bank of China, New York Branch v. NBM LLC*, 359 F.3d 171, 183 (2d Cir.2004). "Where the erroneously admitted evidence goes to the heart of the case against the defendant, and the other evidence against the defendant is weak, we cannot conclude that the evidence was unimportant or was not a substantial factor in the jury's verdict." *Grinage*, 390 F.3d at 751 (citing *Wray v. Johnson*, 202 F.3d 515, 524-30 (2d Cir.2000); *United States v. Forrester*, 60 F.3d 52, 64-65 (2d Cir.1995)).

The government did not present DiBella as an expert witness.[18] Instead, the government informed the district court that DiBella would be testifying only to Adelphia's accounting records and not regarding "the appropriateness of [the] accounting treatment." Noting the "overwhelming complexity of the case," the court asked counsel, "[h]ave you ever seen a case in which a summing up was more appropriate than this one?" Over Defendants' objection, the court accepted the government's representation of DiBella's testimony as that of "someone who has gone through the books and records and will testify to what the books and records reflect," and permitted DiBella to testify as a fact witness. The court added that it would "revisit" its decision "if the government's representation[,] inadvertently or otherwise [,] is not what the testimony of this witness will be . . . ." Defendants later objected that several lines of questioning impermissibly invoked expert testimony; the district court allowed DiBella to continue.

It is undisputed that DiBella had personal knowledge of Adelphia's books. Tatum Partners, the company for which DiBella worked, was retained by Adelphia in August 2002, after Defendants were indicted, "to assist in the restatement or correction of Adelphia financial statements." DiBella began working as a full-time Adelphia employee in September 2002. In the course of nearly twenty months at Adelphia, DiBella developed what he characterized as "fairly extensive knowledge of the debt area of Adelphia" by reviewing the Co-Borrowing Agree-

[18] The government did not attempt to satisfy the reliability requirements set forth in Federal Rule of Evidence 702 or disclose DiBella as an expert pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G).

ments, and other documents within the company, focusing on "several of the areas of related-party transactions with the Rigas family, including securi ty purchases, margin loans, other transactions." He also familiarized himself with Adelphia's accounting system and the software used to generate reports. Using data collected by Adelphia's accounting system, DiBella created Government Exhibit 101, a chart that summarized the affiliate receivable transactions between Adelphia and certain Rigas entities from 1999 through April 2002.

DiBella testified, using Government Exhibit 101, about co-borrowing debt transferred from Adelphia's books to the ledgers of the RFEs. Brown had already testified that the purpose of the reclassifications was to mask the amount of money that the RFEs owed Adelphia. DiBella explained that these reclassifications involved (1) the reduction of debt in Adelphia's balance sheets; (2) a corresponding reduction in the amount owed to Adelphia by an RFE; and (3) the creation of a payable to the RFE from an Adelphia subsidiary. DiBella testified that Adelphia's net related-party receivable balance would have been $2.8 billion higher without the debt reclassifications, for a total of around $3.2 billion.

Defendants' cross-examination attempted to show that the reclassifications were legitimate, and that the RFEs owed the reclassified $2.8 billion to the banks – not to Adelphia. On redirect, DiBella noted that the debt reclassification "really shouldn't have occurred [because] Adelphia's still responsible for that debt." In its final redirect question, the government asked DiBella how much, "[b]ased on [his] review of the records and the analysis," the RFEs owed Adelphia. DiBella's answer – "$3.2 billion."

Defendants contend that DiBella gave expert opinion testimony about what Adelphia's books should have shown. They argue that the government "concealed from the court, the defense, and . . . the jury" that this was opinion, not fact, testimony. In support of this argument, Defendants point to DiBella's deposition testimony in a subsequent Adelphia-related civil case. In mid-February 2005, DiBella testified that the receivable balance on Adelphia's books did not include the $2.8 billion of reclassified debt, but indicated that, based on a "review of accounting literature," it was "quite clear that Adelphia had no basis to relieve the debt from its balance sheet." When asked to name the accounting literature he had reviewed, DiBella said that he considered FAS 140.[19]

Defendants also argue that the prosecutor "misrepresent[ed]" to the district court that DiBella would merely be a summary witness; this "deceit," Defendants opine, was tantamount to a "foul blow that violated the prosecution's fundamental obligation to see that justice is done." *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

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[19] Defendants also argue that DiBella's testimony regarding Adelphia's books was, as a matter of fact, incorrect, because the Restatement of Suretyship and Guaranty recognizes that while the *bank* has the right to collect from either co-borrower on a loan that provides for joint and several liability if the loan is overdue, the borrowing parties may themselves have an understanding as to which one must repay the money. Restatement (Third) of Suretyship and Guaranty § 1 cmt. p (1996). Defendants do not contend that they made this argument to the district court, and we did not find it in our review of the record; we decline to address it for the first time on appeal.

The government contends that DiBella did not offer expert testimony because he merely "d[id] the math" to explain how the reclassifications that Brown indicated were fraudulent affected Adelphia's ledger. The government also argues that DiBella's subsequent deposition testimony that the debt reclassification entries were improper under the relevant accounting literature does not transform his testimony in the Rigas trial into the product of accounting analysis.

Did DiBella offer impermissible expert testimony? If his testimony "result[ed] from a process of reasoning familiar in everyday life," it was permissible lay opinion testimony under Rule 701.[20] Fed.R.Evid. 701, advisory committee's note to 2000 amend. (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)). A witness's specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony "expert" as long as it was based on his "investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise . . . ." *Bank of China*, 359 F.3d at 181. If, however, the witness's testimony was "not a product of his investigation, but rather reflected [his] specialized knowledge," then it was impermissible expert testimony. *Id.* at 182. In particular, Rule 701(c), which prohibits testimony from a lay witness that is

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[20] Federal Rule of Evidence 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge . . . .

"based on scientific, technical, or other specialized knowledge," is intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed.R.Evid. 701 advisory committee's note to 2000 amend.; *see also Bank of China*, 359 F.3d at 181.

The district court did not abuse its discretion in permitting DiBella to testify under Rule 701 about the effects of the disputed reclassifications. *Garcia*, 413 F.3d at 210. First, DiBella's testimony was based upon his observations during his twenty months as an Adelphia employee. Fed.R.Evid. 701(a). DiBella was responsible for correcting Adelphia's financial statements and was well-acquainted with the records of Adelphia and the RFEs. While Defendants argue that DiBella's opinion was based on what *Adelphia's* records *should* have shown, DiBella's testimony was based upon Adelphia's and the RFEs' records, and addressed the aggregate of what the RFEs would actually owe Adelphia if the debt reclassifications, which Brown and others testified were fraudulent, had not occurred.

Second, DiBella's opinion about the effects of the reclassifications was "helpful to . . . the determination of a fact in issue . . . ." Fed.R.Evid. 701(b). As the district court noted, testimony that summed up the government's allegations was quite "appropriate" in this complicated case. DiBella's testimony about both the undisputed $386 million and the reclassified $2.8 billion helped explain how the allegedly improper reclassification affected what the RFEs owed Adelphia.

Third, DiBella's opinion about the reclassifications was "not based on . . . specialized knowledge," because

he presumed that the reclassifications were shams, as Brown and others testified, and then explained how the reclassifications affected the amount the RFEs owed Adelphia. Fed.R.Evid. 701(c). Whether these reclassifications should have been carried on Adelphia's books, as a matter of appropriate accounting techniques, was a separate issue. While DiBella did testify briefly on redirect that moving the reclassifications to the RFEs' books was improper, the remainder of his testimony regarding the reclassifications related to how the reclassifications affected the amount the RFEs actually owed Adelphia. DiBella's deposition testimony in a later case that FAS 140 required the debt reclassifications to be recorded on Adelphia's books does not compel the conclusion that his testimony here was impermissible expert opinion.

Finally, even if portions of DiBella's redirect testimony were admitted in error, this error was harmless. Defendants have not shown that this testimony had a "substantial and injurious effect or influence" on the jury's verdict. *Dukagjini*, 326 F.3d at 62; *see also Bank of China*, 359 F.3d at 183. We are confident that, given the importance of any wrongly admitted testimony and the overall strength of the government's case, "the error did not influence the jury, or had but very slight effect." *Dukagjini*, 326 F.3d at 62 (citation omitted).

Bank Fraud Convictions: The Indictment Was Not Constructively Amended, But the Conviction on Count Twenty-Three Must Be Reversed on Sufficiency Grounds

Defendants challenge their bank fraud convictions (Counts Twenty-Two and Twenty-Three) on two grounds: first, that the bank fraud charges were constructively amended, and second, that the evidence submitted at trial was insufficient to prove either the charged bank fraud or the constructively amended bank fraud.[21] We conclude that the Superseding Indictment was not constructively amended, but that the government proffered insufficient evidence to prove that the misrepresentations alleged in Count Twenty-Three were material. We affirm Defendants' convictions on Count Twenty-Two, but reverse their convictions on Count Twenty-Three on sufficiency grounds and instruct the district court to enter a judgment of acquittal on that Count.

I. Constructive Amendment

Defendants argue that the government's proof at trial constituted a constructive amendment of the indictment. An indictment has been constructively amended "[w]hen the trial evidence or the jury charge operates to 'broaden[ ] the possible bases for conviction from that which appeared in the indictment.'" *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (second alteration in original) (quoting *United States v. Miller*, 471 U.S. 130, 138, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985)); *see also United States v.*

[21] Defendants made both of these arguments in post-trial motions before the district court, and were unsuccessful. *See United States v. Rigas*, No. 02-1236-cr (LBS), 2004 WL 2601084 (S.D.N.Y. Nov. 15, 2004).

Kaplan, 490 F.3d 110, 128-29, No. 05-5531-cr, 2007 WL 1087270, at *16 (2d Cir. Apr.11, 2007). We exercise *de novo* review of a constructive amendment challenge, *United States v. Wallace*, 59 F.3d 333, 336 (2d Cir.1995), which is a *per se* violation of the Grand Jury Clause of the Fifth Amendment[22] requiring reversal. *United States v. Roshko*, 969 F.2d 1, 5 (2d Cir.1992) (explaining that, where constructive amendment "affects an essential element of the offense," it "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" (alteration in original) (internal quotation marks omitted)); *see also Milstein*, 401 F.3d at 65.

Alternatively, "'[a] variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.'" *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir.2003) (quoting *United States v. Frank*, 156 F.3d 332, 337 n. 5 (2d Cir.1998)). A defendant alleging variance must show "substantial prejudice" to warrant reversal. *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir.1990); *see also* Fed.R.Crim.P. 52(a); *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006).

Section IV of the Superseding Indictment explained, at paragraphs 159 and 161, that Co-Borrowing Agreements required "quarterly reports to . . . lenders regarding each borrowing group's compliance with the conditions of the credit facilities, and, in

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[22] The Grand Jury Clause provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ." U.S. Const. amend. V, cl. 1.

particular, [the borrowing group's] ratio of cash flow to indebtedness."[23] The indictment further alleged, at paragraph 160, that Timothy Rigas and Mulcahey, along with other Adelphia employees, "prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, among other things, the cash flow of the reporting entities." If a borrowing group was not in compliance with its loan covenants, or if it could obtain a better interest rate by reporting a more favorable ratio of cash flow to indebtedness, paragraph 162 alleged, Timothy Rigas and Mulcahey, together with other Adelphia employees, "routinely made one or more fraudulent adjustments to the financial information disclosed in the required loan compliance documents." Finally, paragraph 163 stated:

> Such fraudulent adjustments to financial information submitted to the banks took a number of forms. Often, TIMOTHY J. RIGAS and MICHAEL C. MULCAHEY, together with Brown, would record revenue due from affiliates, without any factual basis, and direct Adelphia employees to credit such revenue to a particular borrowing group so that it would be in compliance. At other times, TIMOTHY J. RIGAS and MULCAHEY would direct Adelphia employees either to lower the borrowing group's actual costs or increase its extra revenues, again with no factual basis. Such fraudulent adjustments had the effect of increasing the cash flow for a particular borrowing group so as to bring it into compliance with its loan agreements.

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[23] See discussion *supra* page [69a-70a].

The charging paragraphs for Counts Twenty-Two and Twenty-Three – paragraphs 210-11 – incorporated by reference the allegations contained in paragraphs 1-197[24] and 204-05,[25] and alleged that John Rigas, Timothy Rigas, Michael Rigas, and Mulcahey committed bank fraud by "falsely represent[ing] that the borrowers on [two] credit agreements . . . were in compliance with certain material terms of those credit agreements." The Superseding Indictment briefly described, and set forth the approximate dates of, the two Co-Borrowing Agreements.

Defendants contend the only bank fraud theory properly set forth in the Superseding Indictment was that "post-closing adjustments" to financial information resulted in bank fraud. They argue that their convictions were based on an entirely different theory, referenced only in Section II of the indictment, that related to the EBITDA manipulations from marketing support contracts with Motorola and Scientific Atlanta. They argue that the jury should not have been permitted to consider any conduct or scheme other than the one specifically alleged in Section IV of the Superseding Indictment.

The government argues that the Superseding Indictment was sufficiently broad for the jury to consider whether the fraudulent EBITDA manipulations from the marketing support contracts "trickled down" to affect the leverage ratios reported in compliance reports to the banks. The government contends the

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[24] Paragraphs 123-26, for example, included the allegations that Defendants manipulated Adelphia's EBITDA by entering into marketing support agreements with two companies, which were identified at trial as Scientific Atlanta and Motorola.

[25] Paragraphs 204-05 described the means and methods Defendants employed to carry out the charged conspiracy.

indictment did not limit it to proving only that post-closing adjustments and management fee forgiveness affected the leverage ratios that were submitted to the banks. The government also notes that the Superseding Indictment alleged that the Defendants "prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, *among other things*, the cash flow of the reporting entities" and "falsely represented that the borrowers on the credit agreements set forth below were in compliance with certain material terms of those credit agreements." Moreover, the Superseding Indictment alleged that Defendants "caused Adelphia to engage in sham transactions with affiliates for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports" and "caused Adelphia to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports."[26] The Superseding Indictment also alleged that Defendants "caused Adelphia to submit false and misleading compliance reports, and to make other false and misleading statements, to banks and holders of Adelphia's corporate debt." Because the Superseding Indictment was sufficiently broad, the government argues, the sham marketing support transactions with Motorola and Scientific Atlanta, along with journal entries which booked non-existent fee income from certain RMEs and RNCEs, permissibly demonstrated the means by which Defendants caused Adelphia to engage in sham transactions "for the purpose

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[26] These allegations are in the section of the Superseding Indictment relating to the "means and methods by which [Defendants] . . . would and did carry out the conspiracy," which was incorporated by reference by the charging paragraphs.

of substantiating the fraudulent loan compliance reports."

To establish a constructive amendment, the Rigases must show that trial evidence or the jury instructions "so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *Salmonese*, 352 F.3d at 620 (internal quotation marks omitted). "[W]here a generally framed indictment encompasses the specific legal theory or evidence used at trial," there is no constructive amendment. *Milstein*, 401 F.3d at 65 (quoting *Salmonese*, 352 F.3d at 620). As a result, "an indictment drawn in more general terms may support a conviction on alternate bases, even though an indictment with specific charging terms will not." *United States v. Zingaro*, 858 F.2d 94, 99 (2d Cir.1988).

Our constructive amendment jurisprudence has resulted in what we recently characterized as apparently "divergent results." *Milstein*, 401 F.3d at 65 (collecting cases). One constant, however, is that we have "consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality*[27] to be proven at trial."

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[27] *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 181-182 (2d Cir.2002); *Salmonese*, 352 F.3d at 620-22 (fraud conspiracy; "core criminality" was fraud scheme of selling stripped warrants, and proof of unalleged sales was not a constructive amendment); *United States v. Danielson*, 199 F.3d 666, 669 (2d Cir.1999) (firearm possession charge; because defendant had notice of "core of criminality," government was permitted to present theory that shells, rather than entire rounds, had traveled in interstate commerce); *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir.1997) (conspiracy to possess with intent to distribute controlled substances; where indictment alleged

United States v. Patino, 962 F.2d 263, 266 (2d Cir. 1992) (emphasis added) (internal quotation marks omitted). "[P]roof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir.1983). However, "even an amendment or a variance that does not alter an essential element may still deprive a defendant of an opportunity to meet the prosecutor's case." *United States v. Helmsley*, 941 F.2d 71, 90 (2d Cir.1991).

The Supreme Court recently reiterated the "two constitutional requirements for an indictment: first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Resendiz-Ponce*, --- U.S. ----, 127 S.Ct. 782, 788, 166 L.Ed.2d 591 (2007) (internal alterations and quotation marks omitted). The issue in determining whether an indictment has been constructively amended, then, is whether the deviation between the facts alleged in the indictment and the proof adduced at trial undercuts these constitutional requirements. If the indictment notifies the defendant of the "core of criminality," *Patino*, 962 F.2d at 265-66, and the government's proof at trial does not "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury," *United States v.*

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cocaine and methamphetamine, instruction to permit conviction on basis of marijuana transaction was a constructive amendment because defendant "was not given notice of the core criminality to be proven at trial").

Clemente, 22 F.3d 477, 482 (2d Cir.1994), then he has sufficient notice "of the charge against which he must defend," *Resendiz-Ponce*, 127 S.Ct. at 788.

We recently affirmed a conviction for wire fraud where the only wire transfer actually alleged in the indictment was not proven. *Dupre*, 462 F.3d at 140-141. There was no constructive amendment, we held, "because the evidence at trial concerned the same elaborate scheme to defraud investors as was described in the indictment," even though none of the wire transfers presented in the trial had been alleged in the indictment. *Id.* The indictment and the evidence at trial contained the same starting and ending dates of the conspiracy, and the prosecution demonstrated the same overall scheme – that defendants misled investors into believing that they would eventually be able to obtain certain funds belonging to family members of former Philippine president Ferdinand Marcos. *Id.* at 141. The discrepancy between the wire transfer alleged in the indictment and the transfers proven at trial constituted a non-prejudicial variance; we affirmed the conviction. *Id.* at 141-42.

In *Milstein*, the indictment alleged that pharmaceuticals were "misbranded" because the "[f]orgery or falsification of any part of the packaging material, including the instructional inserts, lot numbers or expiration dates, renders the drug misbranded under federal law." 401 F.3d at 64 (alteration in original). We found that, by charging him with misbranding because he had "re-packaged drugs as if they were the original product from the licensed manufacturers," the government had "not necessarily place[d] Milstein on notice" that it would also attempt to

prove that the drugs were unsterile.[28] *Id.* at 65. Thus, we were persuaded that the indictment was constructively amended and reversed on that count. *Id.*

Defendants' case lies somewhere between *Dupre* and *Milstein*. Here we must determine whether permitting the jury to consider the trickle-down effects of the marketing support agreements with Motorola and Scientific Atlanta constituted a constructive amendment of the indictment. The issue, then, is whether the Superseding Indictment put Defendants on notice that the jury might consider these EBITDA manipulations. *See, e.g.*, *Resendiz-Ponce*, 127 S.Ct. at 788. While Paragraph 163 appears to limit the manner in which the government planned to prove bank fraud, it is not the only paragraph in the indictment that addresses bank fraud. The government's argument that there was no constructive amendment finds support in other paragraphs that suggest that the specific allegations of bank fraud are merely exemplary. Furthermore, the charging paragraphs for bank fraud incorporate by reference Paragraph 204, which alleges broadly that "[D]efendants and their co-conspirators caused Adelphia to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports."

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[28] We also noted that there were twenty different methods of misbranding at the time of Milstein's offense. *Milstein*, 401 F.3d at 65 (citing 21 U.S.C. § 352(a)-(t) (1994)) (describing ways in which one could misbrand drugs), amended by, inter alia, Food and Drug Administrative Modernization Act of 1997, Pub.L. No. 105-115, Title I, §§ 125, 126 (repealing 21 U.S.C. §§ 352(d), 352(k), 352(l)).

When the crime charged involves making false statements, "the 'core of criminality' is not the substance of the false statements but rather that knowing falsehoods were submitted . . . ." *United States v. Sindona*, 636 F.2d 792, 797 (2d Cir.1980) (citing *United States v. Bernstein*, 533 F.2d 775 (2d Cir. 1976)). In our opinion, Defendants were notified of the "core of criminality" the government intended to prove. *Patino*, 962 F.2d at 265-66. Furthermore, we must read an indictment "to include facts which are necessarily implied by the specific allegations made." *United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) (internal quotation marks omitted). The Superseding Indictment explained that the sham transactions "g[a]ve the false appearance of revenue to Adelphia," and this sham increase in revenue artificially inflated Adelphia's EBITDA. Adelphia was merely a holding company – any borrowing was done through its subsidiaries or, as through the Co-Borrowing Agreements, combinations of its subsidiaries and certain RFEs. The leverage ratios reported to the banks under the Co-Borrowing Agreements were, roughly, debt divided by cash flow. An increase in revenue from the sham transactions increased the subsidiaries' cash flow, artificially decreasing the leverage ratios they reported to the banks. The Co-Borrowing Agreements linked interest rates to the leverage ratios and provided that leverage ratios above a certain level were an event of default; manipulating the leverage ratios could, therefore, artificially lower interest rates or present the false appearance that the subsidiaries complied with the conditions of the Agreements.

Defendants therefore had notice that the government would seek to prove that they "caused Adelphia

to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports" and that the government would introduce evidence about the sham marketing support agreements that resulted in an artificial increase in revenue. That this increase in revenue would contribute to the false and fraudulent loan compliance report is "necessarily implied by the specific allegations made." *LaSpina*, 299 F.3d at 177; *see Dupre*, 462 F.3d at 140-141.

Our holding also comports with *Sindona*. In *Sindona*, we held that where, in response to a request for a bill of particulars, the government referred defense counsel to certain counts of an indictment – counts that had, incidentally, been dismissed – the defendant had "notice that the core of the crime charged was the concealment of the source of the funds and not the illegality of the fiduciary system" used to conceal those funds. 636 F.2d at 797. We found that there was no constructive amendment, and that the defendant's claim on appeal that he was "surprised by the 'shift' of the [g]overnment late in the trial" was, if anything, non-prejudicial variance. *Id.* at 797-98. Here, likewise, the fact that the jury was permitted to consider proof of the trickle-down EBITDA manipulation in determining whether Defendants were guilty of bank fraud would, at most, constitute a variance. While Defendants' brief contains, in a footnote, a cursory allegation of prejudice, they have not shown the "substantial prejudice" required to warrant reversal on variance grounds. *McDermott*, 918 F.2d at 326; Fed.R.Crim.P. 52(a). Defendants' claim that evidence presented at trial constituted a constructive amendment, or prejudicial variance, of the Superseding Indictment thus fails.

II. Sufficiency

A defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir.2003) (quoting *United States v. Finley*, 245 F.3d 199, 202 (2d Cir.2001)). Sufficiency analysis requires a court to review the separate "[p]ieces of evidence . . . not in isolation but in conjunction," *United States v. Miller*, 116 F.3d 641, 676 (2d Cir.1997), and to draw all reasonable inferences in the light most favorable to both the jury's verdict, *United States v. Stavroulakis*, 952 F.2d 686, 695 (2d Cir.1992), and the government, *United States v. Moore*, 208 F.3d 411, 413 (2d Cir. 2000). If "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," we must affirm the conviction. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The federal bank fraud statute criminalizes:

> knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises . . . .

18 U.S.C. § 1344.

"[T]he 'scheme to defraud' clause . . . requires that the defendant engage in . . . a pattern or course of conduct designed to deceive a federally chartered or insured financial institution into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss." *Stavroulakis*,

952 F.2d at 694. First, the government must prove that the defendant engaged in a deceptive course of conduct by making material misrepresentations.[29] *Neder v. United States*, 527 U.S. 1, 16, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *United States v. Rodriguez*, 140 F.3d 163, 167-68 (2d Cir.1998). "A false statement is material if it has a 'natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004) (quoting *Neder*, 527 U.S. at 16, 119 S.Ct. 1827). We have also held that "[t]o be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir.2000) (quoting *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir.1994)). Analysis of the misrepresentations must be in the context in which they were made. *See, e.g., Weinstock v. United States*, 231 F.2d 699, 702 (D.C.Cir.1956) ("Materiality must be judged by the facts and circumstances in the particular case.").

Second, the government must prove that the defendant, through the scheme, intended to victimize the bank by exposing it to loss. *United States v. Barrett*,

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[29] Although a statement's materiality may present a question of law resolvable by an appellate court in some contexts, *see, e.g., Kungys v. United States*, 485 U.S. 759, 772, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988); *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir.1998), a criminal defendant is entitled to have a jury determine his guilt on every element of his alleged crime and the jury must pass on the materiality of a defendant's misrepresentations. *United States v. Gaudin*, 515 U.S. 506, 522-23, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Accordingly, we will not consider in the first instance arguments regarding materiality that were not presented to the jury.

178 F.3d 643, 647-48 (2d Cir.1999). "[A]ctual or potential loss to the bank is not an element of the crime of bank fraud but merely a description of the required criminal intent."[30] *Id.* at 648.

Defendants argue that the government did not prove that misrepresentations made to the banks were material. Defendants rely on *FDIC v. W.R. Grace & Company*, 877 F.2d 614, 620 (7th Cir.1989), a Seventh Circuit civil bank fraud case, for the proposition that, in Defendants' words, a false statement to a bank is "material only if it was capable of affecting a decision that the bank was entitled to make under the loan agreement." Specifically, they contend that the government should have been required to prove that the trickle-down effect of the marketing support agreements resulted in a fraudulent leverage ratio that caused the bank to receive less interest than it would have under the actual leverage ratio.

James Brown testified that, in the 1990s, he, Timothy Rigas, Michael Mulcahey, and others would meet quarterly to discuss the leverage ratios of the subsidiaries in the borrowing group and compare them to the leverage ratios required by the Co-Borrowing Agreements. Brown testified that the marketing support manipulations that were intended to improve Adelphia's EBITDA also "impacted the subsidiaries in the borrowing groups" by "caus[ing] the leverage ratio to appear lower than it really was because the EBITDA number was overstated." The government asked, "what effect could that have on the interest rate those affiliates and subsidiaries paid?" Brown

[30] Defendants do not contest that the government proved a scheme to defraud the banks.

responded, "[t]he banks would get less interest payments than they had bargained for."

Brown also testified that if the co-borrowing subsidiaries' leverage ratios were still "out of compliance" with "what was required in the loan agreements," he, Timothy Rigas, and others "would make other types of manipulations of either arbitrarily moving expenses between companies or adding invented affiliate income or interest income from one internal company to another." While Brown was personally involved with these manipulations only during an earlier period not covered by the indictment, he opined that they continued into 2000 and 2001 because he had "reviewed documents that make it pretty clear, and had conversations with people while I worked there that were consistent with what I saw in the documents."

Mulcahey testified that each Co-Borrowing Agreement tied the interest rate of a loan to a range of leverage ratios; changes in the leverage ratios within the range did not alter the interest rate. Mulcahey noted that reducing management fees paid by a borrowing group would increase the cash flow in that borrowing group and reduce the leverage ratio. But the interest rate paid to the bank was not reduced until the decrease was large enough to "cross the threshold" into another interest rate. Mulcahey testified that $6 million in management fees were reduced from the CCH Co-Borrowing Group in 2001 to "put the borrowing group in a better position as far as the [interest] on the agreement."[31] Mulcahey did

[31] Mulcahey also testified that leverage ratio manipulations lowered the interest rate the UCA Co-Borrowing Group paid to the banks; however, the government did not charge the Defen-

not identify any OCH manipulations that were intended, or sufficient, to cross the threshold into a different interest rate.[32]

In support of Count Twenty-Two, which alleges Defendants committed bank fraud from approximately April 14, 2000 through May 2002 using the CCH Co-Borrowing Agreement, the government submitted the loan agreement itself, a compliance certificate submitted to the banks for the quarter ending June 30, 2001, and several pages of typed and handwritten notes relating to "CCH compliance." The "CCH compliance" notes contained a page dated October 1, 2001, with this handwritten comment: "Leverage is 5.01 – I think Mike would want it to be less than 5.00 to get interest savings – talk to M [illegible]." The leverage ratio the CCH Borrowing Group later reported to the banks for that period was 4.98. Another note relating to the CCH facility included this handwritten comment: "Reduce mgt fees to prior period levels to improve leverage ratios and pro forma debt." An arrow was drawn from that statement to another, which directed – in what Mulcahey identified as his handwriting – "Please reduce management fees by 6MM." The CCH Co-Borrowing Agreement provides that the interest rates on the revolving credit facilities increase at leverage ratios of 4.75 and then again at 5.25, and that the interest rates on the term credit facilities increase if they are above 5.0.

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dants with bank fraud with regard to the UCA Co Borrowing Group.

[32] *See supra* footnote 9 regarding the CCH and OCH Co-Borrowing Groups.

In support of Count Twenty-Three, which alleges Defendants committed bank fraud from approximately September 28, 2001 through May 2002 using the OCH Co-Borrowing Agreement, the government submitted the loan agreement and a Borrowing Notice, dated October 22, 2001, that requested a Revolving Loan of over $423 million.[33] The Borrowing Notice incorporates by reference the terms of the OCH Co-Borrowing Agreement and makes several statements, including the following: "All of the representations and warranties of any Company set forth in the Loan Documents are true and correct in all material respects . . ." and "No Default or Potential Default has occurred and is continuing or will arise after giving effect to the requested Borrowing."

In its closing statement, the government told the jury that

> the indictment charges, and we've shown you, that these defendants on behalf of Adelphia[,] and in particular Mike Mulcahey[,] filed loan compliance certifications with Adelphia's banks that lied, that lied about the true leverage ratio of Adelphia's borrowing groups, and it lied about the true leverage ratio by inflating the EBITDA that was used to calculate it and by misleadingly taking out expenses that should have lowered the EBITDA, like the management fees you've heard about.

The government argued that the manipulations were

> done to change the leverage ratio that was shown to the banks, to fool the banks about what the real leverage ratio was. And you learned that

[33] The government submitted no compliance certificates.

> that harmed the banks, because the banks got paid less interest from these manipulations. The lower the leverage ratio, the less interest Adelphia paid, and the less interest the Rigas family paid on the co-borrowings.
>
> And so when Adelphia lied to the banks about having a lower leverage ratio, they got to pay the banks unfairly low interest. That's the gravamen, that's the base, of the co-borrowing bank fraud. And Count Twenty-Two charges the CCH facility, and County Twenty-Three charges the OCH facility.

The court instructed the jury on bank fraud. While Defendants do not appeal the jury instructions, they are summarized in the margin.[34]

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[34] In the substantive bank fraud instruction, the court read the indictment, which alleged that "[D]efendants falsely represented that the borrowers on the credit agreements [in Counts Twenty-Two and Twenty-Three] . . . were in compliance with certain material terms of those credit agreements." The court explained that to establish a violation of the bank fraud statute, the government would have to prove beyond a reasonable doubt that each Defendant "executed a scheme or artifice to defraud a bank, or . . . to obtain money owned by or under the custody or control of the bank, by means of materially false or fraudulent pretenses, representations, or promises; to wit, that the defendant falsely represented that the borrowers on the credit agreements set forth in Counts [Twenty-Two] and [Twenty-Three] were in compliance with certain material terms of those agreements." The court also instructed the jury that the government had to prove Defendants' intent to defraud and that the banks were federally chartered or insured financial institutions.

In its instructions for bank fraud conspiracy, the district court informed the jury that Defendants were "charged with agreeing to execute a scheme to defraud one or more banks by filing false and misleading compliance reports regarding its loans." The court also explained that "[t]he false or fraudulent

The testimony of Brown and Mulcahey certainly support the "intent" element of bank fraud. But proving a scheme does not prove that Defendants' misrepresentations were material. *See, e.g., United States v. Williams*, 12 F.3d 452, 456 (5th Cir.1994), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). In *Neder*, the Supreme Court rejected the idea that a bank fraud conviction could stand "so long as the defendant *intended* to deceive the victim, even if the particular means chosen turn out to be immaterial, *i.e.*, incapable of influencing the intended victim." *Neder*, 527 U.S. at 24, 119 S.Ct. 1827.

This is a rather unusual bank fraud case; most bank fraud is committed when a defendant makes a misrepresentation to a bank in an effort to persuade the bank to make a discretionary decision in a way that benefits him. It is clear that any number of misrepresentations made by an applicant for a loan are or can be "material." The bank's subjective decision may be influenced by many variables, including inaccurate leverage ratios. *See, e.g., United States v. Pribble*, 127 F.3d 583, 591 (7th Cir.1997); *United States v. Coffman*, 94 F.3d 330, 333 (7th Cir.1996). The bank fraud case the government presented to the jury involved misrepresentations intended to yield interest savings – but the Co-Borrowing Agreements constrained the bank's "discretion"[35] to charge differ-

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representation must relate to a material fact or matter . . . . [A] material fact is one that a reasonable person would have considered important in making a decision."

[35] Referring to the bank's discretion to charge a different interest rate is not an entirely accurate description of what actually occurred under the Co-Borrowing Agreements. A leverage ratio above 5.0 on the CCH Co-Borrowing Agreement, for

ent interest rates. The Co-Borrowing Agreements did require that the information submitted be accurate "in all material respects" – but this leaves unanswered the question of what, exactly, was "material." The simple fact that the Co-Borrowing Agreements required information does not make any misstatement of that information *per se* material. *Cf. Rodriguez*, 140 F.3d at 168.

Defendants' misrepresentations certainly concerned a variable that mattered to the banks; the leverage ratio was clearly relevant information. But "relevance" and "materiality" are not synonymous. In *Weinstock*, the D.C. Circuit explained the a distinction between materiality and relevance: "'To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made." 231 F.2d at 701. We find *Weinstock* persuasive: While the leverage ratio here is certainly relevant, Defendants' misrepresentations were material only if they tended to affect interest rates. *See also Coffman*, 94 F.3d at 335 (distinguishing between relevant misrepresentations that are material and "mere puffery").

Misrepresentations that are "material" in the context of "an objective decisionmaking process" would tend to be quite different from misrepresentations that are material in subjective decisions such as "the decision to enter a contract or to do some act in detrimental reliance on the assertion of another." *Kungys v. United States*, 485 U.S. 759, 787, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (Stevens, J., concurring

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example, would automatically require the co-borrowers to pay a higher interest rate on the term loan component than one that was below 5.0.

in the judgment, joined by Marshall & Blackmun, JJ.).[36] In the context of an objective decisionmaking process, whether a misrepresentation is "material" requires examination of the factors the decisionmaker would employ, and the degree to which a misrepresentation would be "capable of influencing[] the decision of the decisionmaking body." *Neder*, 527 U.S. at 16, 119 S.Ct. 1827. If a bank's discretion is limited by an agreement, we must look to the agreement to determine what factors are relevant, and when a misstatement becomes material. *See W.R. Grace & Co.*, 877 F.2d at 620.

The government offered sufficient evidence to show that Defendants made misstatements about the leverage ratios. For those misstatements to be material, however, they had to be capable of influencing a decision that the bank was able to make. *Neder*, 527 U.S. at 16, 119 S.Ct. 1827; *W.R. Grace*, 877 F.2d at 620. The government did not call witnesses from the bank to testify that variations in leverage ratios within a given range for which interest rates remain constant could influence the bank's decisions.[37] The only "decisions" that the bank could make, in the case the government presented to the jury, involved how much interest would be charged – an objective decision cabined by the ranges set in the Co-

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[36] Although *Kungys* involved the materiality requirement of misrepresentations in the context of denaturalization proceedings under the Immigration and Naturalization Act of 1952, § 340(a), 66 Stat. 260, as amended, 8 U.S.C. § 1451(a), we have described *Kungys* as addressing "the same uniform definition of 'material' that is typically used in interpreting criminal statutes." *Monter v. Gonzales*, 430 F.3d 546, 554 (2d Cir.2005).

[37] We need not speculate whether such witnesses would affect this analysis.

Borrowing Agreements.[38] The misrepresentation was material only if the jury could have concluded that the fraudulent leverage ratio resulted in the co-borrowers being in a different interest category than they would have been had the accurate leverage ratio been reported.[39] *Cf. Kungys*, 485 U.S. at 774-76, 108 S.Ct. 1537.

With regard to Count Twenty-Two (involving the CCH Co-Borrowing Agreement), the government presented compliance documents and notes regarding manipulations of these documents, and Muleahey testified that he reduced management fees from the CCH Co-Borrowing Group by $6 million to "put the borrowing group in a better position as far as the [interest] on the agreement." Handwritten notes

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[38] The government argues on appeal that, with respect to Count Twenty-Two, even if the difference between actual and misrepresented leverage ratios was insufficient to affect interest rates, the misrepresented leverage ratios were included in Borrowing Notices to the banks and may have affected the banks' decision to permit the OCH Co Borrowers to obtain funds via the revolving loan agreement. We have not found, and the government has not identified, any point during the trial where this argument regarding materiality was made to the jury. Therefore, we will not consider it on appeal. *See supra* n. 29.

[39] We are not deviating from the holdings of *Neder* and *Barrett* that the government has no burden to prove actual damages. *Neder*, 527 U.S. at 25, 119 S.Ct. 1827; *Barrett*, 178 F.3d at 647-48. In this case, proof that the misrepresentation could affect a decision that the banks could make under the contract would also establish that the banks received less interest. An example may help explain that the proof required here only incidentally proved actual damages. If the government alleged that the actual leverage ratio would have permitted the banks to call the loans, and the leverage ratio was manipulated to prevent the banks from so doing, the proof sufficient to show materiality need not also show that the bank suffered actual damages.

dated October 1, 2001 state that the leverage ratio was 5.01, and the leverage ratio reported to the banks was 4.98. The term loan component of the OCH Co-Borrowing Agreement provided that a higher interest rate would be charged if the leverage ratio was above 5.0. There was sufficient evidence for the jury to conclude that the misrepresentations were material.[46]

With regard to Count Twenty-Three (involving the OCH Co-Borrowing Agreement), the evidence submitted to the jury cannot support a finding that any misrepresentations regarding the OCH Co-Borrowing Agreement were material. The government did not proffer at trial the theory that the Borrowing Notice was a misrepresentation intended to influence the bank's decision to permit the co-borrowers to withdraw funds under the OCH Co-Borrowing Agreement. The evidence supporting the leverage ratio/interest rate manipulation scheme appears to boil down to Brown's conclusory opinion that bank debt compliance documents were manipulated in 2000 and 2001 because he had "reviewed documents that make it pretty clear, and had conversations with people while [he] worked there that were consistent

[46] We reject Defendants' argument that the management fee forgiveness was, as a matter of law, not fraudulent. Brown testified that there was "no legitimate basis" to reduce the management fees. The banks did not receive a fair and accurate picture of the co-borrowers' true finances as a result of this manipulation, and Mulcahey admitted that the only reason the management fees were forgiven was to entitle the banks to less interest. We think that the evidence presented by the government at trial as to the aggregate effect of the EBITDA trickle-down and the direct management expense schemes was sufficient to allow the jury to convict Defendants on Count Twenty-Two.

with what [he] saw in the documents." This does not suffice to prove that Defendants made material misrepresentations to the banks regarding the OCH Co-Borrowing Agreement. *See Neder*, 527 U.S. at 24, 119 S.Ct. 1827; *Rodriguez*, 140 F.3d at 168 (false statement not material because government set forth no evidence at trial that misrepresentation could have or did influence bank's decision).

"Uncharged Conduct" Claims: The Bill of Particulars Did Not Constructively Amend the Indictment and Defendants Failed to Show They Were Prejudiced by Any Error in Admitting Evidence

Defendants next argue that they were prejudiced by the improper admission of uncharged crime evidence. The district court admitted, over Defendants' objection, evidence of certain acts that, Defendants allege, either occurred before the charged crimes or were not addressed in the Superseding Indictment or Bill of Particulars. *In our view, most – if not all – of* the evidence at issue was properly admitted, and any error was harmless.

At a pretrial hearing, Defendants requested a limiting instruction that proof of allegations that were contained in the Bill of Particulars[41] but absent in

[41] At Defendants' request, the district court ordered the government to provide a bill of particulars specifying the conduct it intended to prove when it used the phrase "among other things" in the Superseding Indictment. In one of the Bill's introductory paragraphs, the government stated that it "believe[d] that all of the conduct detailed herein [was] part of, or background to, the conspiracy and schemes charged in the Indictment." The government also gave notice – which it later withdrew – that it planned to offer proof, under Federal Rule of Evidence 404(b), of conduct that was not part of the conspiracy to show "among other things, the defendants' knowledge, fraudulent intent, lack

the indictment was "not admissible for purposes of proving the crimes in the indictment." The district court denied the request. At trial, the government proffered evidence that Defendants characterize as "twenty uncharged acts of alleged misconduct." They claim that seven of these acts took place prior to the period charged in the indictment, and ten of them were not mentioned in the Bill of Particulars but were "raised for the first time at trial."

Defendants make two arguments here: first, that the government constructively amended the indictment through the Bill of Particulars, and second, that the evidence of uncharged bad acts predating the indictment period was improperly admitted.

I. Constructive Amendment through the Bill of Particulars

Defendants argue that the Superseding Indictment was impermissibly broadened by the Bill, which specified the conduct the government intended when it used the phrase "among other things" in the indictment.

An indictment that fulfills the requirements of Federal Rule of Criminal Procedure 7(c)(1) but is nonetheless "insufficient to permit the preparation of an adequate defense" may be supplemented with a bill of particulars. *United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir.1985); *see also United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir.1987). A bill of particulars "enabl[es a] defendant to prepare for

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of mistake, and the relationship of trust and reliance between the defendants." Soon after they received the Bill, Defendants argued to the district court that it constituted a constructive amendment of the Indictment, and they moved to prevent the government from offering evidence under Rule 404(b). The district court denied the motion.

trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir.1988) (quoting *Bortnovsky*, 820 F.2d at 574). While "it is a settled rule that a bill of particulars cannot save an invalid indictment," *Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), the bill's purpose is to "advise the defendant of the specific acts of which he is accused," *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir.1999) (internal quotation marks omitted). Thus, a bill of particulars may contain facts not alleged in the indictment. *Cf. United States v. Jaswal*, 47 F.3d 539, 542-543 (2d Cir.1995) (indictment that did not allege year of commission of offense was not defective; defendants could have "demand[ed] a bill of particulars specifying the date of the offense they were charged with"); *United States v. Bagaric*, 706 F.2d 42, 61-62 (2d Cir.1983), *overruled on other grounds by Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

We have examined the Superseding Indictment and the Bill and are confident that the Bill merely particularizes the indictment by advising Defendants of the specific acts of which they are accused. *Walsh*, 194 F.3d at 47. The acts alleged in the Bill regard the "matter of proof to sustain" the charges in the indictment — including conspiracy to commit securities fraud, to make and cause to be made false statements in filings with the SEC, and to commit bank fraud; securities fraud; and bank fraud. *United States v. Mayo*, 230 F.Supp. 85, 86 (S.D.N.Y.1964) (Weinfeld, J.). The Bill does not impermissibly add

additional charges.[42] *See United States v. Pope*, 189 F.Supp. 12, 26 (S.D.N.Y.1960) (Weinfeld, J.). The Bill of Particulars did not constructively amend the Superseding Indictment.

II. Admissibility of Evidence

Defendants argue that the district court improperly admitted evidence of "bad acts" that predated the indictment period. This evidence, according to Defendants, was neither necessary to complete the story of the crime nor essential to provide background to the conspiracy.

We review a district court's "evidentiary rulings under a deferential abuse of discretion standard and give district court judges wide latitude in determining whether evidence is admissible at trial." *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 148 (2d Cir. 2001) (internal quotation marks omitted); *see also United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002). Abuse of discretion review requires more than concluding that the court below "made a different

[42] We find that the district court did not abuse its discretion in admitting evidence of acts that occurred during the period charged in the indictment. For example, the government presented evidence that Adelphia paid more than $500,000 for antiques in John Rigas's possession. The Superseding Indictment charged that Defendants "used Adelphia funds and other assets for their personal benefit, and that of other members of the Rigas family," and listed several allegations which, as shown by the use of "[a]mong other things," were intended only as examples. The Bill further specified that Adelphia paid $39 million to a furniture store owned by John and Doris Rigas. In notifying Defendants that the government would seek to prove that Adelphia made payments to John Rigas's furniture store, the Bill was sufficiently specific to permit Defendants to prepare for trial and to prevent surprise. *See Davidoff*, 845 F.2d at 1154.

decision than we would have made in the first instance." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir.2001). Instead, a court abuses its discretion when its decision "cannot be located within the range of permissible decisions" or is based on a clearly erroneous factual finding or an error of law. *United States v. Fuller*, 426 F.3d 556, 562 (2d Cir. 2005) (citations and internal quotation marks omitted).

The government argues that the acts were either properly charged or were "not considered other crimes evidence under Fed.R.Evid. 404(b)" because they "arose out of the same transaction or series of transactions as the charged offense, [were] inextricably intertwined with the evidence regarding the charged offense, or [were] necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir.2000) (quoting *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir.1997)); *see also United States v. Inserra*, 34 F.3d 83, 89 (2d Cir.1994). The government contends most of these acts were either repeated during the period of the charged conspiracy[43] or were recorded in Adelphia's ledgers in

[43] For instance, Christopher Thurner, John Rigas's private accountant, testified that in 1995 or 1996, John Rigas submitted false invoices to Adelphia for renting his condommmums in Cancun to Adelphia employees and guests. The invoices were false because, as Thurner testified, "[t]here were charges being made to Adelphia for guests that were not staying" at John Rigas's condominiums. Defendants argue that this conduct predated the indictment period and should not have been admitted. But Thurner testified John Rigas submitted similar fraudulent invoices to Adelphia about five or six times per year from 1995 or 1996 to 2002 – well into the charged period. Thus, Thurner's explanation of how the fraudulent invoice scheme began was proper as context to "complete the story" of the scheme. *Carboni*, 204 F.3d at 44.

a way that affected Adelphia's financial statements into the period of the conspiracy.[44] We agree, and conclude that the district court did not abuse its discretion in admitting most – if not all[45] – of the disputed acts.

For any errors to warrant reversal, Defendants are required to show that the improperly admitted evidence had a "substantial and injurious effect or influence" on the jury's verdict. *Dukagjini*, 326 F.3d at 62 (citation omitted); *see United States v. Barnes*, 158 F.3d 662, 666, 673 (2d Cir.1998). Given the weight of evidence supporting the jury's verdict on

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[44] John Rigas purchased for an RFE two separate cable systems in the early 1990s and then directed that Adelphia funds be used to pay off the notes. The pay-off period extended into the period alleged in the indictment. One purchase was consummated in 1992, but the payment schedule provided that the note would be paid over a ten-year period. The government submitted proof that Adelphia made payments for this system from June 1998 through January 2002. John Rigas purchased the other cable system in 1990, and the government presented evidence that Adelphia made interest payments on the note in the mid-1990s. Adelphia paid off the balance on the note in October 1999 – again, within the charged period. The district court did not err in admitting testimony about these two cable system purchases because the scheme continued into the charged period. *Carboni*, 204 F.3d at 44.

[45] The government presented evidence that John Rigas induced Thurner to apply for a $20,000 loan from Adelphia in 1995 and then transfer it to him. The government argues that this act was admissible because, as the loan was unpaid even as of the date of trial, it should have been disclosed as a loan from Adelphia to John Rigas in proxy statements during the period charged in the indictment. As any error in admitting this evidence was harmless, we need not decide whether the loan, which was ostensibly between Thurner and John Rigas, should have been disclosed on the proxy statements during the period charged in the indictment.

each charge, we conclude that they have not done so. The Bill of Particulars did not constructively amend the indictment or constitute a prejudicial variance, and the district court did not err in admitting the evidence Defendants contend was uncharged or prior bad acts; regardless, any arguable error was harmless.

Conclusion

Defendants' convictions are AFFIRMED, except for their conviction on Count Twenty-Three, which is hereby REVERSED. The case is REMANDED for an entry of ACQUITTAL on Count Twenty-Three and for resentencing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of December, two thousand nine.

Nos. 08-3485-cr(L), 08-3500-cr(CON), 08-3592-cr(CON, 08-3597-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants-Appellants.

[filed Dec. 29, 2009]

John Rigas and Timothy Rigas having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

CATHERINE O'HAGAN WOLFE,
Clerk of Court

By: /s/ FRANK PEREZ
Frank Perez, Deputy Clerk

REGULATORY PROVISIONS INVOLVED

Section 2B1.1 of the United States Sentencing Guidelines (2001) provides as follows:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $30,000	add 6
(E) More than $70,000	add 8
(F) More than $120,000	add 10
(G) More than $200,000	add 12
(H) More than $400,000	add 14
(I) More than $1,000,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,000,000	add 20

(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.

(2) (Apply the greater) If the offense—

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

(B) involved 50 or more victims, increase by 4 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery, increase by 2 levels.

(7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction,

decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(8) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(9) If the offense involved (A) the possession or use of any device-making equipment; (B) the production or trafficking of any unauthorized access device or counterfeit access device; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(10) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level is less than level 14, increase to level 14.

(11) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(12) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Mate

rials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343), and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028,

1029, 1030(a)(4) (5), 1031, 1341 1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 2113(b), 2312-2317; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1 Definitions. For purposes of this guideline:

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm" and "destructive device" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes

intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm. For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases. In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foresee-

able costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Protected Computer Cases.—In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

(B) Gain.—The court shall use the gain that resulted from the offense as an alternative

measure of loss only if there is a loss but it reasonably cannot be determined.

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) The cost of repairs to damaged property.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) Exclusions from Loss. Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and

Codes. *In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 7(A).*

(ii) *Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.*

(iii) *Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a,*

criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.

(iv) Ponzi and Other Fraudulent Investment Schemes. In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

(v) Certain Other Unlawful Misrepresentation Schemes.– In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

(vi) Value of Controlled Substances. In a case involving controlled substances, loss

is the estimated street value of the controlled substances.

3 Victim and Mass-Marketing Enhancement under Subsection (b)(2).—

(A) Definitions.—For purposes of subsection (b)(2):

(i) "Mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit. "Mass marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.

(ii) "Victim" means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(B) Undelivered United States Mail.

(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was

undelivered United States mail, "victim" means any person (I) described in subdivision (A)(ii) of this note; or (II) who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) Special Rule.—A case described in subdivision (B)(i) of this note that involved a Postal Service (I) relay box; (II) collection box; (III) delivery vehicle; or (IV) satchel or cart, shall be considered to have involved 50 or more victims.

(iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).

(C) Vulnerable Victims.—If subsection (b)(2)(B) applies, an enhancement under §3A1.1(b)(2) shall not apply.

4. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:

(A) The regularity and sophistication of the defendant's activities.

(B) The value and size of the inventory of stolen property maintained by the defendant.

(C) The extent to which the defendant's activities encouraged or facilitated other crimes.

(D) *The defendant's past activities involving stolen property*

5. *Application of Subsection (b)(7).*—

(A) *In General.*—*The adjustments in subsection (b)(7) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.*

(B) *Misrepresentations Regarding Charitable and Other Institutions.*—*Subsection (b)(7)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(7)(A) applies, for example, to the following:*

(i) *A defendant who solicited contributions for a non-existent famine relief organization.*

(ii) *A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.*

(iii) *A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defen-*

dant intended to divert some of the funds for the defendant's personal benefit.

(C) *Fraud in Contravention of Prior Judicial Order.*—*Subsection (b)(7)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).*

(D) *College Scholarship Fraud.*—*For purposes of subsection (b)(7)(D):*

"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(7)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) Subsection (b)(7)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

6. Sophisticated Means Enhancement under Subsection (b)(8).—

(A) Definition of United States.—For purposes of subsection (b)(8)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(8)(C), "sophisti-

cated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

7. Application of Subsection (b)(9).—

(A) Definitions.—For purposes of subsection (b)(9):

"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. "Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"Device making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18

U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(3), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.

"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

(B) Identification Documents.—Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

(C) Application of Subsection (b)(9)(C)(i).—

(i) In General.—Subsection (b)(9)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) Examples.—Examples of conduct to which subsection (b)(9)(C)(i) applies are as follows:

(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) Nonapplicability of Subsection (b)(9)(C)(i): —Examples of conduct to which subsection (b)(9)(C)(i) does not apply are as follows:

(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(D) Application of Subsection (b)(9)(C)(ii).— Subsection (b)(9)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

8. Chop Shop Enhancement under Subsection (b)(10).—Subsection (b)(10) provides a minimum offense level in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.

9. Gross Receipts Enhancement under Subsection (b)(12)(A).—

(A) *In General.—For purposes of subsection (b)(12)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.*

(B) *Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

10. *Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B).—For purposes of subsection (b)(12)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.*

11. *Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C.*

§ 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.

12. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".

13. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to §2X1.1.

14. Multiple Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a com-

mon scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).

15. *Departure Considerations.—*

(A) *Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

(i) *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*

(ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).*

(iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not*

included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

(v) The offense endangered the solvency or financial security of one or more victims.

(vi) In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vii) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(B) Downward Departure Consideration. There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guide-

lines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punish-

ment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.

Subsection (b)(7)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106 420.

Subsection (b)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(9)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(9)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain)

new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(11)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(12)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.

Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104-132.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 7); November 1, 1989 (see Appendix C, amendments 99-101 and 303); November 1, 1990 (see Appendix C, amendments 312, 317, and 361); November 1, 1991 (see Appendix C, amendments 364 and 393); November 1, 1993 (see Appendix C, amendments 481 and 482); November 1, 1995 (see Appendix C, amendment 512); November 1, 1997 (see Appendix C, amendment 551); November 1, 1998 (see Appendix C, amendment 576); November 1, 2000 (see Appendix C, amendment 596); November 1, 2001 (see Appendix C, amendment 617).

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

March 19, 2010

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Timothy J. Rigas and John J. Rigas
v. United States
Application No. 09A876

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on March 19, 2010 extended the time to and including May 28, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ SANDY SPAGNOLO

Sandy Spagnolo
Case Analyst

[attached notification list omitted]

Patrick M. Northen (PN-3771)
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Attorneys for Defendants John J. Rigas and Timothy J. Rigas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Cr. 1236 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants.

AFFIDAVIT OF PETER FLEMING JR.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER FLEMING JR., being duly sworn says:

1. I am a member of the Bar of this Court and of the firm of Curtis, Mallet-Prevost, Colt & Mosle LLP.

2. I served as lead counsel in the defense of John Rigas at the trial which resulted in his conviction on July 8, 2004. I make this affidavit in connection with the motion of John and Timothy Rigas for a new trial based upon testimony provided in the post-conviction litigation.

3. There is attached to this affidavit as Exhibit A a description of events having to do with the potential testimonial composition of the defense case in the criminal trial. It accords with my recollection of all the events in which I was involved, and, to the extent it involves my co-counsel, is based upon their recent communications with me. Co-counsel do agree with the contents of Exhibit A.

/s/ PETER FLEMING JR.
Peter Fleming Jr.

[Notary Stamp Omitted]

EXHIBIT A

The case against the Rigases was unique in terms of the breadth of the alleged criminal conduct. The indictment charged fraud in connection with the recording of, and disclosure relating to, the co-borrowed debt, and the reclassification of co-borrowed debt from the books of Adelphia to the books of a Rigas co-borrower in connection with the October 2001 securities purchase by a separate Rigas entity. It also charged EBITDA manipulations based upon the marketing support arrangements between Adelphia and Scientific Atlanta and Motorola. In addition, the indictment charged understatement of capital expenditures in connection with an alleged fraudulent converter box sale from Adelphia to a Rigas entity, misrepresentations to rating agencies concerning de-leveraging and liquidity, fraud in connection with the payments of funds to members of the Rigas family, the payment by Adelphia of Rigas margin loan calls, the undisclosed use of corporate aircraft and the undisclosed development of a golf course on land owned by the Rigases, and bank fraud based upon claimed improper post-closing adjustments designed to impact the leverage ratio reported to lenders.

The large number of charges in the indictment, which themselves raised a myriad of accounting and disclosure issues, were expanded by the Government's Bill of Particulars (which was filed in June 2003) and then by its Preclusive Bill of Particulars (which was filed in January 2004). There, the Government charged:

- Alleged fraud in connection with a variety of securities transactions other the October 2001 securities purchases (BOP ¶ 81 a. 2.)

- The alleged improper allocation of interest associated with the co-borrowing debt and the affiliate receivables (BOP ¶ 81 a. 3.)
- Improper activities in connection with a multitude of real estate transactions (BOP ¶ 81 a. 4.-10.)
- The improper allocation of the cost associated with the acquisition of the Prestige cable systems (BOP ¶ 81 a. 11.)
- Alleged undisclosed payments to Wending Creek Farm and Eleni's Interiors (BOP ¶ 81 a. 12-13.)
- Alleged improper advances of funds to finance the production of Songcatcher (BOP ¶ 81 a. 14).
- Alleged improper charges to Adelphia for golf club memberships, other personal expenses of the Rigases (e.g., Ellen Rigas's wedding), and charitable donations (BOP ¶ 81 a. 15-16.)
- The alleged improper taking by John Rigas of $30,000,000 in the early 1990s (BOP ¶ 81 a. 17.)
- The alleged misappropriation of treasury stock for use in connection with the acquisition of the Sabres hockey franchise (BOP ¶ 81 a. 18.)
- Alleged EBITDA manipulations resulting from the improper failure to consolidate foreign cable systems (BOP ¶ 82 a. 1.)
- Alleged EBITDA manipulations resulting from the improper recording of placement fees (BOP ¶ 82 a. 3.)

- Alleged misrepresentations concerning the use of margin loans in connection with securities transactions (BOP ¶ 82 a. 4-5.)
- Alleged misrepresentations in the statements of cash flow relating to advances to and from related parties (BOP ¶ 83 a. 6.)
- Alleged EBITDA manipulations resulting from the improper charge to capital expenditures of labor costs (BOP ¶ 89 a.)
- Alleged EBITDA manipulations resulting from the use of misleading subscriber numbers in calculating revenue under programming contracts with HBO/Cinemax and Viacom (BOP ¶ 89 b.)
- The alleged improper recognition of revenue resulting the @Home warrants (BOP ¶ 89 c.)
- Alleged EBITDA manipulations resulting from the over-capitalization of labor costs, subcontractor fees, insurance premiums and system power costs (BOP ¶ 96 a.)[1]

Deloitte & Touche audited Adelphia during all of the years in question and, in each year, issued a clean audit opinion. Buchanan & Ingersol, and its partner, Carl Rotherberger, were Adelphia's main outside counsel during the entire period in question, were involved in virtually every major transaction, including all of the direct placements of securities to

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[1] During trial, the Government was permitted to prove additional transactions, beyond those identified in even an expansive reading of the Bill of Particulars, that were claimed to have been fraudulent and that gave rise to accounting issues. For example, the Government was permitted to show that John Rigas acquired certain local cable systems with funds, paid over time, from the Adelphia concentration account.

the Rigases and all of the co-borrowing credit facilities, and attended all of the Board meetings. The Government did not call any witness from Deloitte or Buchanan. Nor did the Government call any witness from Scientific Atlanta or Motorola, the contraparties in the marketing support transactions. Further, in addition to those current and former Adelphia employees called by the Government during its case (including Brown), other witnesses with potentially relevant knowledge who remained employed by Adelphia were not called by the Government.

Shortly before trial, the Government produced 3500 material relating to more than 150 Government witnesses. That material, as it related to Deloitte personnel, included transcripts of testimony, including testimony in SEC investigative proceedings relating to Adelphia. To the extent these materials related to certain issues in the criminal case – including the recording of the co-borrowing debt and the netting of affiliate receivables – it was of significant benefit to the defense position.

Attempts were made by the defense to interview relevant personnel from Deloitte, Scientific Atlanta and Motorola, and Buchanan. Deloitte refused interviews. Counsel did have limited contact with individual counsel for Gregory Dearlove, the Deloitte engagement partner for the year end 2000 audit, and through counsel received limited information regarding what Mr. Dearlove might say. However, it is uncertain whether a full interview would have been permitted, and Mr. Dearlove received an SEC Wells Notice on October 1, 2003, making any cooperation

with the defense in a criminal case extremely remote.[2] While defense counsel believe that Scientific Atlanta and Motorola refused interviews, they cannot support that belief with certainty.

The position of these entities was somewhat unusual, but understandable in light of the fact that the Government, in its Preclusive Bill of Particulars, identified Scientific Atlanta and Motorola as "co-conspirators" and stated:

> The Government hereby gives notice that it reserves the right to add Ivan Hoffmann, William Caswell, and Deloitte & Touche, LLP, to the list of unindicted co-conspirators pending the outcome of ongoing investigative efforts.

The effect of being identified by the Government as a co-conspirator in any case – much less a case of this magnitude – is obvious.

Counsel for Buchanan likewise informed defense counsel that he would not permit his clients to talk with the defense. It was further suggested to defense counsel that individual Buchanan attorneys might assert their Fifth Amendment privileges if called to testify.

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[2] Mr. Dearlove was subsequently the subject of an SEC administrative proceeding pursuant to Section 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice. In that case, the Administrative Law Judge found that the SEC's own expert had acknowledged that no FAS standard specified how joint and several liability arising under a credit agreement should be treated, and had conceded that "the joint-and-several liability provisions of the credit agreement were not sufficient, on their own and without resort to FAS 5, to support his conclusion that most of the co-borrowing debt should have been booked as Adelphia's liability."

Finally, in an October 14, 2002 memorandum, issued shortly after the indictment had been returned and when Adelphia was openly cooperating with the government and under the threat of indictment, Adelphia's Vice President and General Counsel directed all Adelphia employees in no uncertain terms that they should not speak with the Rigases or their counsel and should report to him any efforts that were made by the Rigases or their representatives to contact the employees. In the memorandum, the employees were advised that Adelphia's Legal Department would review any such contact "and may refer the matter to appropriate government agencies." Quite clearly, this memorandum had a chilling effect on personnel who could potentially assist the defense. Aside from the risk of job loss in a community with few employment opportunities, no employee would want the prosecution to be told that he or she was cooperating with the defense. The chilling effect of Adelphia's memorandum was underscored when the Government itself identified a host of Adelphia employees, including Dean Marshall, Joseph Sabol and Jason Woolcock, as co-conspirators and co-schemers in its Bill of Particulars. Michael Brady, an Adelphia employee who was not identified as a co-conspirator, did speak to defense counsel on two or three occasions, but subsequently, when approached by a defense team investigator, refused to say anything without a subpoena. Ann Montgomery refused to return calls from that investigator.

Counsel's diligence is also demonstrated by letters that were sent to a large number of individuals (or, where known, their counsel) identified by the Government as witnesses in the 3500 material, includ-

ing, among others, Joseph Sabol and Jason Woolcock, as well as many of the senior Deloitte personnel. In the letter, defense counsel asked for an opportunity to meet or speak telephonically with the witness at a time and in a fashion convenient for the witness. The defense received few responses to those letters, and in those few responses, the witnesses declined to be interviewed.

In sum, any Adelphia employee in a significant accounting role was targeted as a criminal, and all Adelphia employees were gagged under threat of reference to the Government; Motorola and Scientific Atlanta were labeled as corrupt; and Deloitte & Touche and its personnel were, at a minimum, under suspicion. Indeed, in a pre-indictment meeting in the Summer of 2002, counsel for John Rigas expressed the view that any charge based upon the impropriety of the accounting for and disclosures relating to the co-borrowing debt would be wrong and unfair because Deloitte, as the Government knew, had known about and passed upon these issues based upon a FAS 5 analysis. AUSAs Clark and Coleman responded by stating in words or substance that Deloitte was indictable. Later, during trial, counsel for John Rigas reiterated the view, this time to AUSA Owens, that the co-borrowing fraud charge was wrong in the face of the clear evidence that Deloitte knew the relevant facts and approved the accounting and disclosure. AUSA Owens responded in words or substance that if he had one more piece of evidence establishing criminal intent on the part of Deloitte, he would indict the firm. It is a certainty that the Government's position had been expressed to Deloitte and its counsel. That Deloitte was at

serious risk in the event it supported the Rigas defense cannot be questioned.

For whatever reasons, including the foregoing, key witnesses – identified by the Government as potential Government witnesses – were not available for interview by the defense. Had the Government called these witnesses, the defense would have cross-examined. When the Government did not call any of these witnesses, the defense was put to a Hobson's choice – (a) subpoena the witness and take him "cold" not knowing what he might say concerning issues about which the 3500 material was silent or ambiguous, with the obvious risk that the Government, having undoubtedly advised the witness (or the company with which he or she was associated) that the witness or the employer was in peril, could potentially obtain very damaging testimony, true or false, on those issues from a defense witness, or (b) pass on calling the witness. The choice was discussed among counsel and with at least Tim and John Rigas. In the end, counsel, with the concurrence of the Rigas defendants, determined that the appropriate course in all the circumstances was not to call witnesses who would not speak with the defense given the substantial risk that they might testify adversely for whatever reason as to matters not adequately covered in the 3500 materials, and thereby permit the Government to strengthen its case through defense witnesses. This risk was heightened in the case of witnesses – Deloitte, Scientific Atlanta, Motorola and the Adelphia employees – labeled by the Government as actual or potential co-conspirators – who, quite naturally, would not want to testify in a manner that was contrary to the Government's version of the facts.

In a real sense, many of the key witnesses, including those identified above, were unavailable to the defense before and during the criminal trial. As set forth above, the defense made efforts to overcome this hurdle. But the lawyers for the witnesses would not agree to interviews, the Adelphia witnesses were shackled with a gag order and the threat of prosecution, Motorola and Scientific Atlanta were tarred as co-conspirators, and Deloitte was under investigation and refused to be interviewed. Although the Government listed many charges in the bill of particulars, it ultimately chose not to attempt to prove many of those allegations. Indeed, the Government even chose not to attempt to prove certain of the allegations in the indictment (i.e., the converter box fraud). It seems apparent that the Government, which chose not to call an accounting expert and itself avoided calling Deloitte or the attorneys, knew full well that its multiplicity of charges put the defense in the impossible position described.

We believe that counsel's professional judgment was one with which virtually any competent, experienced criminal defense counsel would agree. This Court should find that the witnesses identified herein, and the testimony they gave at subsequent post-conviction depositions and hearings, were unavailable to the defense during the criminal trial.

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Cr. 1236 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF JOHN RIGAS AND TIMOTHY RIGAS' MOTION TO COMPEL PRODUCTION OF NOTES TAKEN DURING GOVERNMENT INTERVIEWS

[Tables of Contents and Authorities Omitted]

John Rigas and Timothy Rigas ("the Rigases"), by and through their undersigned counsel, hereby submit this Memorandum of Law in Support of their Motion to Compel Production of Notes Taken During Government Interviews.

PRELIMINARY STATEMENT

Prior to the commencement of the criminal trial in this case, the government served the Rigases with interview notes and memoranda for dozens of witnesses including many irrelevant witnesses such as secretaries and other low level Adelphia employees.

In contrast, the government did not even disclose that it had interviewed Carl Rothenberger, Adelphia's lead securities lawyer who prepared virtually all of the securities filings that were the subject matter of the criminal trial, let alone produce its interview notes or memoranda relating to that interview. The government has refused the Rigases' explicit request that these materials be produced, claiming that after two days of interviewing Rothenberger and determining not to call him as a government witness, the only exculpatory evidence he provided related to one transaction involving a timber purchase. It strains reason to believe that Rothenberger provided absolutely no exculpatory information regarding his involvement in the myriad of securities and related-party transactions on which he worked on behalf of Adelphia and the Rigases. Rothenberger's subsequent testimony in a civil case demonstrates that the government did, in fact, question him regarding many of these transactions. In the same civil proceeding, Rothenberger provided much exculpatory information regarding the same transactions that the government asked him about. This Court should order that the government immediately produce all relevant notes and memoranda regarding Rothenberger's interview by the United States Attorneys' Office for the Southern District of New York or any other arm of the government including, but not limited to, the SEC.

The Court should further order that the government provide the Rigases with a list of all other interviews of Buchanan Ingersoll attorneys conducted by the government, as well as bankers and representatives from Scientific Atlanta and Motorola, all

of whom gave exculpatory testimony in a subsequent civil depositions.

Finally, the government has refused to produce, or even confirm the existence of, notes or memorandum relating to the SEC's preparation of James Brown's testimony in the Dearlove and Mulcahey civil proceedings. As set forth in detail in the Rigases' Rule 33 Motion, Mr. Brown's testimony in those proceedings was contradictory to his testimony in the criminal trial and exculpatory for the Rigases. It defies logic to believe that his pre-testimony interviews by the SEC would not also have contained exculpatory information. Accordingly, those materials should also be produced.

BACKGROUND

Carl Rothenberger was Adelphia's lead, outside securities and corporate governance lawyer. During the criminal trial, the government focused on numerous securities filings that Rothenberger drafted. He also played a key role with respect to Adelphia's Board meetings and corporate governance issues. He set the agenda for such meetings and advised the company on the approval and disclosure of related party transactions, including the co-borrowing agreements and the Rigas securities purchases. Rothenberger attended and often guided the discussions at company's Board meetings and drafted the minutes for those meetings. His disclosure advice included whether an event or transaction required disclosure and, if so, how the event or transaction should be disclosed. [Carl Rothenberger Deposition Transcript ("Roth. Tr.") (Declaration, Ex. 1) 10-13.] From 1996 through 2001, he spent between 60% and 90% of his time working on Adelphia matters. [Roth. Tr. 55.] He attended all Adelphia Board meetings during this

period. [Roth. Tr. 61.] In light of this role, he is one of the most important witnesses in any Adelphia matter, including this criminal case. Despite his key role at Adelphia and, in particular, his role with respect to the government's main allegations against the Rigases, the government did not call Rothenberger as a witness at the criminal trial.

As part of its prosecution of the Rigases, the government conducted a broad investigation of Adelphia. On January 27, 2004, the government sent the Rigases an updated list of witness statements that included over 150 people, including memoranda of interviews of Rothenberger conducted by counsel to Adelphia's Special Committee. [Declaration, Ex. 2.][1] The government provided the Rigases with notes from interviews that it conducted with over 70 people included on this list. Many of the people included on this list had a very limited involvement with and knowledge of Adelphia and were consequently of minor importance to the case. For example, the government produced its notes from interviews with Dick Garbarino, who was a self-employed caretaker. The government nevertheless produced the notes of its interviews with these people, including many people whose names were never even mentioned at

[1] Although the written memoranda of interviews conducted by counsel to Adelphia's Special Committee were produced, the handwritten notes and drafts of such interviews were never produced. Dennis Coyle, Chair of the Special Committee, testified that the government co-opted Adelphia's internal investigation: "Covington [counsel to the Special Committee] was co-opted . . . by the government, they weren't reporting to me anymore." [Dennis Coyle Deposition Transcript (Declaration, Ex. 3) 641.] Given the government's control over the Special Committee Investigation, the notes and drafts of interviews should have also been produced to the Rigases.

the trial. It did not produce notes or memoranda from any government interview of Rothenberger. [Declaration, Ex. 2.]

The government also produced transcripts of sworn testimony from the SEC investigation of several of Deloitte's auditors, SEC notes from an interview with Niraj Gupta, a Salomon Smith Barney analyst who covered Adelphia, and two SEC correspondence files concerning Adelphia's SEC filings in 1994 and 1995. No SEC materials relating to Rothenberger were produced. [Declaration, Ex. 2.]

Prior to the criminal trial, Rothenberger consistently refused to speak with the Rigases' defense counsel. Through his counsel, he advised the Rigas defense team that, if he was subpoenaed to testify at trial, he would invoke his Fifth Amendment rights. Rigas defense counsel was also advised that Rothenberger took a similar view with respect to the government: he would not talk to government investigators or lawyers and would assert a Fifth Amendment privilege if subpoenaed.

Notwithstanding the position that Rothenberger enunciated to the Rigas defense team, he in fact agreed to be interviewed by the U.S. Attorney's Office. The interview took place over two days shortly before the commencement of the criminal trial. He was interviewed on February 20 and 21, 2004 by Christopher Clark, one of the prosecution's trial lawyers and by Thomas Feeney, a U.S. Postal inspector. Thomas Feeney took notes of the interview. Although the interview was not recorded, in a subsequent civil deposition, Rothenberger testified that he recalled questions about schedule 13-D filings that were made on behalf of the Rigases. He also remembered discussing either or both the press

release and SEC filing disclosures for the Rigases' stock purchases. [Roth. Tr. 31-32.] The interview also included questions about Form 4s filed by the Rigases.

On February 24, 2004, Clark sent a one sentence letter to criminal counsel informing them that Rothenberger may be able to provide favorable information regarding the timber transaction:

> The Government writes to inform you that Carl Rothenberger, Esq. may be able to provide information that is favorable to the defense concerning the timber rights transaction discussed in the Government's Bill of Particulars.

[Letter from Clark dated February 24, 2004 (Declaration, Ex. 4).] The letter did not disclose that Rothenberger had been interviewed nor did it advise defense counsel what exculpatory information was in the government's possession.[2]

Following the interview, the prosecutors decided not to call Rothenberger as a witness at trial. After the criminal trial, Rothenberger was deposed in a civil proceeding for 13 days – far longer than any other witness. He offered a vast amount of exculpatory evidence on the very issues that the government had questioned him about and stated consistently that he did not believe that any type of fraud had

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[2] In a subsequent deposition in a civil matter, Rothenberger admitted having discussions with Adelphia management and concluding that no Board approval of the timber transaction was required at the time. [Roth. Tr. 1576-81.] Since the government failed to provide the Rigases with this exculpatory information and because Rothenberger refused to speak with the Rigases' counsel prior to the commencement of the criminal trial, the Rigases' ability to defend themselves with respect to this transaction was severely prejudiced.

occurred. His mere acknowledgement that he drafted the relevant disclosures and that they complied with the law is highly exculpatory. His statements during the government interview were surely consistent with his subsequent sworn testimony and must have contained similar exculpatory evidence.

After the Rigases' trial, Rothenberger was also interviewed by the SEC in December 2004 concerning the SEC's investigation of Adelphia matters. There was a court reporter present who transcribed the interview. During a subsequent civil deposition, Rothenberger generally recalled discussing with the SEC transactions in which his firm represented Adelphia as well as transactions in which his firm represented the Rigases but could not remember specific questions that he was asked by the SEC. He also recalled discussing with the SEC conflict issues and general background information. [Roth. Tr. 17-20.] The government has never produced the transcript of this interview.

Many other witnesses have subsequently provided exculpatory testimony in other civil proceedings. In order to identify whether the Department of Justice or the SEC interviewed any of these exculpating witnesses, the Rigases have made several narrow requests that the government acknowledge whether certain witnesses were interviewed. The government has refused to respond to this request.

On September 12, 2007, the Rigases' counsel met with Bill Johnson, the Assistant U.S. Attorney currently in charge of the Rigases' case, to discuss the government's case against the Rigases and the Rigases' motion for a new trial. The substance of the discussions between Mr. Johnson and the Rigases'

counsel is privileged under Federal Rule of Evidence 408 and will not be discussed.

Clark and Richard Owens, who prosecuted the case and are now in private practice, also attended this meeting. During the meeting, counsel for the Rigases summarized testimony that Rothenberger had given in the subsequent civil depositions and highlighted portions of documents used in those depositions that were exculpatory to the Rigases. Clark indicated that the information that was presented was not new and stated that he had interviewed Rothenberger prior to the criminal trial. The Rigases' counsel sought confirmation that there were notes from the meeting and asked the government to produce the notes. On September 21, 2007, Assistant U.S. Attorney Johnson called the Rigases' counsel and informed them that Clark and Postal Inspector Feeney had interviewed Rothenberger on February 20 and 21, 2004. He confirmed that Feeney took notes, which were not produced to the Rigases. The government refuses to produce those notes to the Rigases.

In a letter dated October 15, 2007, the Rigases made a very specific request asking the government to disclose whether the Department of Justice or the SEC possessed materials reflecting interviews (1) with Rothenberger other than the February 20 and 21, 2004 interview identified here; (2) with any other Buchanan Ingersoll attorneys; (3) with Motorola or Scientific Atlanta representatives; and (4) with any lenders or investment bankers involved in Adelphia's transactions. The Rigases also requested in this letter that the government indicate whether there existed any materials reflecting the preparation of James Brown to testify as a government witness

in the Dearlove and Mulcahey proceedings. Given Brown's testimony in those proceedings, the Rigases believe that if any of these materials existed, they would contain exculpatory evidence. In response to the letter, the government declined to indicate whether any of the materials existed nor did they deny that the materials exist. [Declaration, Ex. 5]

ARGUMENT

A. The Legal Standard

The government should produce to the Rigases the notes from Rothenberger's interviews with the Department of Justice and SEC and answer the Rigases inquiries in the October 15th letter. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government has an affirmative duty to produce any evidence favorable to the defendant that is material to either guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 674-75 (1985). Both exculpatory information and evidence that can be used to impeach the prosecution's witnesses are considered "favorable" under *Brady* and must be disclosed by the government. *Id.* at 676-77. In cases where it is not clear whether a particular bit of evidence or information is materially exculpatory, the prosecutor should err on the side of providing the evidence. *United States v. Urciuoli*, 470 F. Supp. 2d 109, 113 (D.R.I. 2007) (citing *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)).

In *United States v. Dennis*, 384 U.S. 855 (1966), the Court found that defendants were entitled to review grand jury testimony that the government had refused to turn over. The Court stated that "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact," and added that "[t]here is no justification for relying upon

'assumption.'" *Id.* at 873-74. The Court also dismissed the idea that a trial judge could always properly weigh the value of information:

> Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. . . . The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

Id. at 874-75. In *Dennis*, the government conceded that the importance of preserving the secrecy of the grand jury minutes sought by the defendant was minimal. Based on a finding that the defendants had demonstrated a "particularized need" for the materials, the Court concluded that the grand jury minutes should be produced to the defendants to review. *Id.* at 874-75.

In a later opinion, the Supreme Court held that *Dennis* did not entitle defendants to the unsupervised authority to search through government files. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1986). "In the typical case where a defendant makes only a general request for exculpatory material under [*Brady*], it is the State that decides which information must be disclosed." In *Ritchie*, the defendant was accused by his minor daughter of various sexual offenses. He sought access to her files held by the Pennsylvania Children and Youth Services. *Id.* at 991. The Court balanced the defendant's interests against the Commonwealth's and concluded that full disclosure to the defendant could sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse interest. *Id.* at 60.

Thus, the *Ritchie* Court did not hold that defendants should always be precluded from gaining access to government files. A prosecutor's decision is final "unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention." *Id.* at 60. "If a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of materiality." *Id.* at 61.

Other courts besides the Supreme Court have ordered government production of documents to defendants who successfully argued that the documents likely contained *Brady* information. In *United States v. Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003), the court ordered the government to produce documents to the defendants. In doing so, the court interpreted *Brady* to require disclosure of exculpatory information that is either admissible or reasonably likely to lead to admissible evidence. *Id.* at 499.

The *Bergonzi* defendants were former executives charged with engaging in fraudulent practices that resulted in the intentional misstatement of their company's publicly reported results. The company independently investigated their past actions. As part of its internal review, the company drafted memoranda based on interviews that it conducted. The company used the memoranda to produce a report, which, along with the interview memoranda, was shared with the government. *Id.* at 490-91.

As part of its prosecution, the government used the report and interview memoranda to organize its initial investigation. *Id.* at 499. One of the defendants argued that the report likely outlined the roles that various officers and employees played at the compa-

ny and thereby probably contained information concerning the process for having made the relevant financial and accounting decisions. This would have affected his defenses of lack of criminal knowledge and intent. *Id.* at 498-99.

The court found that the company's claim that it was a victim and had a "common interest" with the government to be significant. It concluded that the claim "point[ed] persuasively toward a finding" that both the report and underlying interview materials would provide the defendants with exculpatory information that would either be admissible or likely to lead to admissible evidence. The government's concession that it was obligated to produce certain interview memoranda supported the court's conclusion, as did the government's statement that the report provided a useful roadmap. The court consequently compelled the production of the report and interview memoranda to the defendants. *Id.* at 499.

The Second Circuit has also ordered the government to produce documents to defendants making *Brady* claims. In *United States v. Schwarz*, 259 F.3d 59, 62-63 (2d Cir. 2001), two district courts had denied motions to compel the production of FBI and New York City Police Department investigation materials. In its opinion about a *Brady* violation, the court noted that "[t]o consider the *Brady/Giglio* claim on appeal, we ordered the Government to provide appellants and this Court . . . all statements made at the GO-15 hearings (including any summaries of these statements) and all reports of FBI interviews of persons who testified in the GO-15 hearings." *Id.*

B. This Court Should Order the Government to Produce the Rothenberger Interview Materials

This Court should order that the government produce the notes to the Rigases since the notes are likely to contain favorable information that could lead to admissible evidence and the production of the notes would create little burden, if any, upon the government. On the other hand, the information contained in the notes is likely to be of great value to the Rigases.

1. Rothenberger Disclosed Exculpatory Information to the Government

Adelphia filed suit against Deloitte on November 6, 2002. *Adelphia Communications Corp. v. Deloitte & Touche LLP*, No. 02-000598 (Pa. Ct. Com. Pl. Phila. Co., Nov. 6, 2002). In that case, Rothenberger was deposed for a total of 13 days, and he provided a large amount of favorable testimony for the Rigases. During that deposition, Rothenberger recalled that during his interview by the government he was asked questions about schedule 13-D filings that were made on behalf of the Rigases. He also remembered discussing either or both the press release and SEC filing disclosures for the Rigases' stock purchases. [Roth. Tr. 31-32.] The interview also included questions about Form 4s filed by the Rigases. During the depositions, Rothenberger expanded upon these topics, providing compelling exculpatory evidence regarding the Rigases.

a. Rothenberger was responsible for drafting and reviewing Adelphia's and the Rigases' securities filings and did not identify any improprieties in the filings

From 1996 to 2001, Rothenberger understood that Adelphia's directors relied on him and his firm to provide legal advice as to the adequacy of the 10-K and co-borrowing disclosures. Rothenberger was the lead attorney at Buchanan engaged in the review of 10-Ks. Part of the review process was looking at the adequacy of the disclosures. He and his colleagues would have pointed out any inadequacies to Adelphia:

> Q. And if you had seen any deficiencies in the disclosures of the co-borrowings in the 10-Ks or other filings that Adelphia made up through the year 2000, you would have pointed that out to the company; is that correct?
>
> A. We would have raised it for discussion I believe, yes.

[Roth. Tr. 1436-37.] But Buchanan never raised any potential problems with disclosures because its attorneys did not find anything legally inadequate or deficient in the disclosures:

> Q. From 1996 up through May 1st, 2002, did you find any legal inadequacies or deficiencies in the disclosures that were made by Adelphia and their public filings with respect to the co-borrowing facilities?
>
> A. At the time of each such filing, my general recollection is that I did not reach that conclusion.

[Roth. Tr. 1439.]

When Adelphia filed its 2000 10-K, Rothenberger was comfortable that the amount of Rigas co-borrowing debt did not need to be disclosed. [Roth. Tr. 1276-77] Even though he had received a draft 10-K for 2000 that contained the amount of RFE debt, Rothenberger did not advise the Rigases to amend the disclosure related to their co-borrowing. [Roth. Tr. 1281, 1757-60.]

Rothenberger also did not think that there was a legal problem with the joint and several liability of the co-borrowers when the co-borrowing facilities were presented to the Board for approval. He would have called it to the Board's attention if he thought that there was a problem. [Roth. Tr. 340-41.]

This testimony goes to the heart of the Rigases' defense that they relied on the advice of counsel signing the 10-Ks. The fact that experienced SEC counsel saw nothing wrong with these disclosures defies against the notion that the Rigases, who were not expert in the SEC rules, knew the disclosures were misleading.

b. Rothenberger believed the source of funds disclosures in the 13-Ds were accurate concerning the Rigases' stock purchases

In addition to his work on Adelphia's 10-Ks, Rothenberger spearheaded the process for producing 13-Ds. From the mid-1990s onward, he was the lead attorney responsible for preparing the 13-Ds. He or a colleague would typically produce the initial draft of a 13-D. In addition to using information they already knew, Buchanan attorneys received information for preparing 13-Ds from Adelphia, Form 4s, and Chris Thurner. Thurner worked as a controller for Wending Creek Farms, which was owned by John

Rigas, and was Rothenberger's contact for information regarding 13-Ds and Form 4s. Rothenberger found Thurner to be conscientious, thorough, and responsive to requests. He encountered no resistance to his obtaining necessary information for filing the 13-Ds. [Roth. Tr. 268-76, 1796.]

Besides drafting the documents, Rothenberger believed he had an obligation to conduct, and did conduct, a reasonable inquiry as to the facts stated in the 13-Ds:

> Q. When you prepared 13(d)s, did you believe that you had an obligation to conduct a reasonable inquiry as to the facts stated in the 13(d)?
>
> A. My recollection is that generally speaking, that was the way I approached the 13(d).

[Roth. Tr. 324.] As part of verifying the accuracy of the facts provided in 13-Ds, he went through information with respect to transactions that were being reported and attempt to correct numbers, descriptions, and other information. [Roth. Tr. 325.]

Rothenberger also testified that 13-D filings did not need to disclose if money to purchase stock was received from affiliate lenders, such as Highland Video. Instead, the ultimate purchasers of stock needed to disclose their source of funds. For example, the 13-D filed on January 21, 2000 indicated that Highland 2000 purchased 5.9 million shares of class B common stock from Adelphia for $375 million. Highland 2000 received the $375 million from "affiliate borrowings." Rothenberger understood "affiliate borrowings" to mean borrowings from affiliates, in this case affiliates of Highland 2000. Rather, only the ultimate purchaser needed to disclose where it was getting the money. When this 13-D was filed,

Rothenberger understood that there was no obligation to disclose where affiliates received the money to lend to Highland 2000 to come up with $375 million used to purchase stock in January 2000. If Rothenberger had thought otherwise, he would have made that disclosure. [Roth. Tr. 1794-96.]

When Rothenberger worked on the 13-D for the July 3, 2000 Rigas stock purchase, he had the same understanding of the meaning of "affiliate borrowings." The source from where the affiliates were getting the money to lend to Highland 2000 did not need to be disclosed:

> Q. And was your understanding also that the source of where the affiliates were getting the money to lend to Highland 2000 did not need to be disclosed?
>
> A. Again, I don't recall a specific understanding at the time sitting here today. My recollection is that was the general understanding.

[Roth. Tr. 1802.] When Rothenberger was preparing this and other 13-Ds, he tried to do a good job in disclosing what he thought needed to be disclosed. He was not trying to hide anything from anyone, nor was he trying to deceive anyone:

> Q. In general, when you were preparing this and the other 13Ds . . . were you trying to do a good job in disclosing what you thought needed to be disclosed?
>
> A. I believe, generally, yes.
>
> Q. You weren't trying to hide anything from anyone, were you?
>
> A. I don't recall doing that.

Q. Do you recall trying to deceive anyone about where the Rigases were getting the money to buy hundreds of millions of dollars in securities?

A. I don't recall that.

Q. And if you were trying to deceive somebody, do you think you might recall that?

A. I think I might.

Q. In fact, you weren't trying to deceive anybody, were you?

A. I don't recall that I was, no.

Q. I'm trying to give you a real easy question, Mr. Rothenberger. You know – sitting here today, you know for a fact – and I'm not talking about recollection. You know for an absolute certainty that you were not trying to deceive anybody, don't you?

A. Yes.

[Roth. Tr. 1802 03.]

Rothenberger was also the lead attorney for reviewing proxy statements. Other attorneys assisted him with the review process. Rothenberger also prepared part of the proxy statements, including the shareholders table and portions of sections describing specific transactions. Buchanan helped prepare Form 4s, using a process similar to that for 13-Ds. Rothenberger took the lead for preparing these forms. Buchanan received information from non-Rigas directors, and the Rigases, in addition to information they knew. [Roth. Tr. 266.]

As with the 10-Ks, Rothenberger's testimony that he, as drafter of the 13-Ds, did not believe them to be fraudulent underscores that the Rigases also had no

reason to believe there was anything improper about these filings.

c. Rothenberger viewed the liability among co-borrowers as a guarantee

Rothenberger was one of the authors of a memorandum dated April 5, 2000 that concluded that liability under the co-borrowing agreements was in the form of a guarantee. The memorandum analyzed the Arahova indentures that were part of the financing for the Century Holdings co-borrowing facility. The memorandum stated that "[u]nder the credit agreement for the facility, the Arahova borrowers and subsidiaries would be guaranteeing the borrowings made by the Olympus subsidiary, as well as Highland Prestige and any unrestricted borrowers." The Arahova borrowers were Adelphia entities, while Highland Prestige was a Rigas entity. The memorandum concluded that "[w]ith respect to the credit agreement and its cross-guarantee, it would appear that since the non-Arahova borrowers, other than the unrestricted borrowers, will be cross-guaranteeing the Arahova borrowings, that such would appear to be as fair as any third-party transaction would be to Arahova." Rothenberger did not disagree with the memorandum's conclusion, and he would not have put his name on a memo if he did not agree with the conclusion. [Roth. Tr. 141-46.]

d. Rothenberger understood that the golf course was designed to provide a benefit to Adelphia and the Coudersport community

Rothenberger recalled that the "board was well aware" of the golf course project. Various Board members took tours of the property on different occasions. [Roth. Tr. 1582] He knew, prior to March

2002, that the golf course was being built on land owned by John Rigas and land owned by Adelphia. He also knew that having a charitable foundation own the golf course was part of the structure considered for tax and charitable matters. One of the purposes of the investment was to provide amenities to attract and retain Adelphia employees, and the golf course was part of a larger land-use development project in the Coudersport area. The directors were aware of the effort to make the area more attractive to prospective and current Adelphia employees. [Roth. Tr. 1701-08.]

Tim Rigas sought Buchanan's advice about the best ownership structure for the course given its anticipated uses. Buchanan's work that related to the golf course was billed to Adelphia, and Rothenberger did not think that there was a problem with doing so. Final approval was never sought from the Board since the ownership structure had never been resolved. [Roth. Tr. 1710-19.]

Had the Rigases had access to this testimony prior to the criminal trial, they could have severely undermined the government's claims regarding the golf course at trial.

e. Rothenberger did not identify anything legally inappropriate about separating the documentation for marketing support payments and the converter box purchase

Rothenberger received an email from Tim Werth on October 2, 2000 asking him to create a second document in connection with the agreement with Scientific Atlanta for marketing support payments and the purchase of converter boxes. [Roth. Tr. 1878.] Rothenberger knew at the time he was dis-

cussing the documentation for this transaction that there already existed an agreement whereby Adelphia was going to purchase a certain number of digital converter boxes from Scientific Atlanta. [Roth. Tr. 2036.] He also knew that Adelphia was going to add $50 to the price of each converter box by amending the original purchase agreement and that Scientific Atlanta was going to give Adelphia $50 per converter box for marketing support. [Roth. Tr. 2040.]

Rothenberger recalled that it was the company's objective to obtain a better and more appropriate accounting treatment for the purchase and marketing efforts regarding the Scientific Atlanta transaction. This was an accounting approach that several of Adelphia's competitors had taken, and Adelphia wanted to use a similar approach to reflect the services provided with respect to the converter boxes. [Roth. Tr. 1878-79, 2036-38.]

There were two distinct functions that Adelphia was trying to address. The first was the purchase of boxes, and the second was the extensive services, as Rothenberger was told, that the company was providing with respect to the marketing of the digital converter boxes. The marketing of these boxes required significant effort and expense on the company's marketing side. [Roth. Tr. 1879.]

After Rothenberger received this email, he had discussions with Tim Werth, who was Adelphia's director of accounting. He could not recall any concerns regarding this email. Rothenberger did not see any legal problem with the transaction and he did not advise any member of the Rigas family that there was such a problem with the transaction. [Roth. Tr. 1881.]

As set forth above, during the government's interview of Rothenberger, it inquired about 13-D and Form 4 filings, and disclosures contained in Adelphia's press releases and SEC filings. These issues were at the heart of the government's case against the Rigases, and evidence that he provided in civil depositions exculpated the Rigases. Thus, information about the timber transaction cannot be the only information in Rothenberger's interview notes that is exculpatory.[3] The interview covered the central areas of the government's case against the Rigases, and Rothenberger's subsequent civil testimony indicates that he provided exculpatory information during the interview. Clark interviewed him for two days before the trial, but the government decided not to call Rothenberger as witness. This further

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[3] The government's one line sentence suggests that Rothenberger may be able to provide favorable information concerning the timber transaction. It in no way suggests that the government has such favorable information and that the government can provide it. Instead, the government unilaterally decided not to turn over its notes of the Rothenberger interview or even acknowledge that such an interview took place. Rather, at the criminal trial, the government solicited evidence that the timber transaction was harmful to Adelphia and a related-party transaction that was not approved by Adelphia's independent directors, all the while fully knowing that Rothenberger had provided specific advice that the transaction was not a related-party transaction. The government should not be permitted to avoid its legal obligations simply because it does not like what a witness had to say. The jury was entitled to know all of the facts surrounding this transaction not merely those facts that favored the government's position. The reference that Rothenberger, who was not speaking with defense counsel, might have exculpatory information was plainly inadequate to discharge the government's obligation to provide the actual exculpatory information that it knew about as a result of the Rothenberger interview.

demonstrates that Rothenberger provided exculpating evidence about the Rigases.

As was the case in *Bergonzi*, Rothenberger's notes could have provided exculpatory information regarding the Rigases' knowledge and intent. Rothenberger acknowledged that he drafted the relevant disclosures and that they complied with the law. This alone is highly exculpatory. Moreover, the government's disclosure regarding the timber transaction indicates the significance of the interview notes. In *Bergonzi*, the government's production of certain interview memoranda persuaded the court that the other interview memoranda and the report should have been provided to the defendants. For the Rigases, the government's timber transaction letter similarly suggests the potential importance of and need to disclose Rothenberger's interview notes.

2. There Is No Countervailing Interest Militating Against Production

No government interest militates against production of the notes. In *Ritchie*, the court believed that allowing full disclosure to the defense would unnecessarily sacrifice Pennsylvania's interest in protecting its child abuse information. Fully disclosing the records sought by the defendant would have had a "seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse." *Ritchie*, 480 U.S. at 60.

In this case, disclosing the notes would not have an adverse effect upon any government interest. Unlike *Ritchie*, there is no public interest that would be harmed by the production of Rothenberger's notes. Indeed, the government has already turned over interview materials for over 70 interviewees, a number of whom could not provide any significant evidence and consequently were never likely to play any role

in the criminal trial. Furthermore, there is no ongoing investigation of Adelphia matters and no concerns about protecting potential witnesses. The Rigases, however, are not seeking general discovery or making a broad request for *Brady* materials. They are instead making a very narrow request based on substantial and detailed evidence.

Finally, the Rigases should be allowed to view the notes since they are best suited to evaluate the information contained in them. The Rigases have examined Rothenberger's testimony from his civil depositions and will consequently be most able to evaluate the utility of all the information contained in the notes. Allowing them to at least review the notes will provide the best protection of the Rigases' due process rights.

The interview notes provide valuable, exculpatory evidence for the Rigases. The government would suffer no harm from producing the notes, while the Rigases would benefit greatly. The government has turned over notes from the interviews from some of the most minor witnesses but still refuses to produce the notes regarding Rothenberger, who was at the center of events. Producing Rothenberger's notes would not place any greater burden on the government than producing the notes of the other interviewees. Consequently, the government should disclose the notes to the Rigases or permit the Rigases to review the notes at the U.S. Attorneys' office.

C. The Government Should Produce Any Interview Materials from Rothenberger as Part of the SEC's investigation

The government is also obligated to produce any materials from the SEC's interview with Carl Rothenberger. As discussed above, to the extent that

the prosecutor knows of material evidence favorable to the defendant in a criminal prosecution, the government has a due process obligation to disclose that evidence to the defendant. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995); and *Brady*, 373 U.S. 87. The Second Circuit has imposed constructive knowledge on a prosecutor of any information held by those whose actions can be fairly imputed to him – those variously referred to as an "arm of the prosecutor" or part of the "prosecution team." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998), *see, e.g., United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975); and *United States v. Gil*, 297 F.3d 93, 106 (2d Cir. 2002). It is clear that when there is actual knowledge that several arms of the government are involved in the investigation of a particular case, then the knowledge of those arms is imputed to the prosecutions. *Smith v. Sec. of New Mexico Dept. of Corrections*, 50 F.3d 801, 825 n. 36 (10th Cir. 1995).

Where the agency is statutorily or otherwise charged with administration of a statute or program and has consulted with the prosecution, that agency is to be "considered part of the prosecution in determining what information must be available to the defendant charged with violation of the statute." *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995). In *Wood*, the government charged the defendants with conspiracy to defraud the Food and Drug Administration. The prosecution, however, failed to turn over documents in the FDA's possession related to new drug applications. The court determined that the prosecutor and the FDA, as the agency charged with administration of the statute, "were one" for *Brady* purposes. *Id.* at 727, *see also United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (holding a fed-

eral prosecutor responsible for criminal record information residing in the files of the Virgin Islands government); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (finding that the prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it.). *See also United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) (holding that the government must produce information and material in its actual and constructive possession and that constructive possession means anything the prosecutor should have known about).

Thus, the scope of the government's discovery obligation rests upon a finding that the subject information and documents are accessible to the prosecution or that the agency whose files are at issue is closely aligned and working with the prosecution. While it is recognized that knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, *e.g.*, *Avellino*, 136 F.3d at 255, the prosecution is responsible for information and material known to it or of which it should reasonably know.

In this case, prosecutors had actual knowledge of the SEC's investigation. Indeed, prosecutors produced to the Rigases copies of sworn testimony from Deloitte auditors taken by the SEC, SEC interview notes, and other internal SEC files. In addition, the SEC acknowledged in a 2002 press release the U.S. Attorney's Office and the U.S. Postal Inspection Service's assistance in its Adelphia investigation. [Declaration, Ex. 6.] Thus, the files and information of the SEC are within the scope of the government's obligations to disclose.

D. The Government Should Identify Any Materials Reflecting Other Interviews Conducted by the Department of Justice or SEC as Part of the Investigations Involving Adelphia

The government should answer the narrow inquiries made in the Rigases' October 15, 2007 letter. Each of the letter's requests refers to specific, readily identifiable sources of information. Moreover, each request is based on third party information indicating that there is a strong likelihood that if any of the information sought does exist, it would be highly exculpatory.

As discussed above, Rothenberger was the lead attorney for Buchanan and provided much exculpatory information during his depositions. As is the case with the February 2003 interview notes from his interview, any additional material reflecting interviews with Rothenberger would likely yield exculpating information for the Rigases. Furthermore, any interviews of other Buchanan attorneys conducted as part of the investigation of Adelphia could also yield highly exculpatory evidence. It is unlikely that Rothenberger's colleagues who worked on Adelphia matters would have had remarkably different perceptions than Rothenberger did of events at Adelphia. As a result, any materials produced from interviews with other Buchanan attorneys would contain exculpatory information.

Rothenberger was far from being the only witness to provide exculpating testimony in subsequent civil proceedings. Many other witnesses provided testimony in the *Adelphia v. Deloitte* depositions that was exculpatory.

Several bankers have testified in civil proceedings that they were aware that the Rigases were using co-borrowed funds to purchase Adelphia stock. If the Department of Justice or SEC interviewed any bankers, materials based on those interviews could contain pertinent, exculpatory information.

For example, bankers involved with Adelphia's lending agreements knew that a portion of funds from the co-borrowing facilities were used by the Rigas family to purchase Adelphia securities. Thomas Carter, from Bank of America, testified that it was always understood by Bank of America that a portion of the funds in the UCA/HHC facility were intended for use by the Rigas family to purchase Adelphia securities. [Thomas Carter Deposition Transcript (Declaration, Ex. 7) 92-93.] Another Bank of America employee, Pamela Kurtzman, was also aware that the Rigases used co-borrowed funds to buy securities and did not believe that the drawdown from the UCA/HHC facility and distribution for purchases of Adelphia securities was improper. [Pamela Kurtzman Deposition Transcript (Declaration, Ex. 8) 212-14.]

Mark Misenheimer was Wachovia/First Union's primary account officer for Adelphia. He did not think that that use of co-borrowed funds for the Rigases' purchase of Adelphia stock violated the UCA or CCH co-borrowing agreements. [Mark Misenheimer Deposition Transcript ("Misenheimer Tr.") (Declaration, Ex. 9) 275.] He was also aware that funds from one or more of the co-borrowing facilities were being used to the fund some of the Rigases' purchases of Adelphia stock. [Misenheimer Tr. 88-90.]

Any interviews with personnel from Scientific Atlanta or Motorola would have also likely produced

at least some exculpatory information since both Wharton and Tracy testified that their companies had approved the marketing support agreements after having it examined by executives, legal counsel, and auditors. Representatives from both of the cable-box vendors with whom Adelphia entered into the marketing support agreements provided significant exculpating evidence. They used a model that had been used by other cable companies, and Wharton thought that such arrangements were "not unusual" in the cable industry. [John Wharton Deposition Transcript ("Wharton Tr.") (Declaration, Ex. 10) 35, 126-27.] Scientific Atlanta received the go-ahead to do a marketing support agreement with Adelphia in an internal email dated August 11, 2000. [Wharton Tr. 117-20.] Scientific Atlanta had approved the marketing support documents through a "normal approval process," which would have included review by executives, legal counsel, and auditors. [Wharton Tr. 45-48, 52-53, 127-31.]

John Tracy similarly testified that Motorola's executives, counsel, and auditors had approved the marketing support transaction. [John Tracy Deposition Transcript ("Tracy Tr.") (Declaration, Ex. 11) 23-25, 121-24, 144-57.]

Both John Wharton and John Tracy were deposed by both the Department of Justice and SEC about their companies' contracts with Adelphia. [Wharton Tr. 9-10; Tracy Tr. 6.] The Rigases were not informed of and did not receive any materials reflecting these depositions.

Finally, materials reflecting Jim Brown's preparation to testify in the Dearlove or Mulcahey proceedings would be highly exculpatory. Considering that the testimony he gave during these proceedings con-

tradicted his criminal trial testimony, any materials reflecting his preparation for those proceedings would produce exculpatory material for the Rigases.

The Rigases are not fishing for information. Instead, they have specifically identified potential sources that would likely contain favorable, material information based on the sworn testimony of third party witnesses. Allowing the government to continue to stonewall the Rigases would seriously impair the Rigases' due process rights. Consequently, the government should tell the Rigases whether any of the materials referenced in the October 15th letter exist.

CONCLUSION

For all the reasons stated herein, the government should disclose all of Rothenberger's interview notes. In sum, Rothenberger is one of the central figures in this matter. Few people were as involved as Rothenberger was with Adelphia and Rigas matters from 1999 through 2001. He was a skilled attorney with much experience handling corporate securities matters, and Adelphia depended on him to provide legal advice for its SEC filings and disclosures. He produced the initial draft of a number of the public documents produced at trial. He also attended Adelphia's Board meetings and drafted the minutes for those meetings. He even toured the golf course construction site with Tim Rigas and some of the Board members. In sum, Rothenberger had an extensive and thorough knowledge of Adelphia and its transactions.

Rothenberger testified in a subsequent civil proceeding that he had discussed the very transactions and issues at the heart of the government's case against the Rigases in his interview with the gov-

ernment. He further provided exculpatory information regarding those transactions and issues in his subsequent civil deposition including that he did not believe there was anything improper about the securities filings that he worked on. Given this testimony, the Rigases have specifically identified material, exculpating evidence to which the Rigases are entitled under *Brady*. Producing the notes will not burden any government interest, and there is no valid reason why the government should not produce them. The government should produce the notes directly to the Rigases since they can best evaluate the significance of the notes. The government should also answer the Rigases' inquires made in the October 15th letter to ensure that the Rigases' due process rights are fully protected.

Respectfully submitted,

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Dated: December 4, 2007

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Cr. 1236 (LBS)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Defendants.

DEFENDANTS JOHN AND TIMOTHY RIGAS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF NOTES TAKEN DURING GOVERNMENT INTERVIEWS

[Tables of Contents and Authorities Omitted]

Defendants John J. Rigas ("John Rigas") and Timothy J. Rigas ("Tim Rigas") (collectively "the Rigases"), by and through their undersigned counsel, submit this Reply Brief in further support of their Motion to Compel Production of Notes Taken During Government Interviews (the "Motion").

The most important aspect of the Government's opposition to the Motion is the glaring absence of any contention that Rothenberger did not provide exculpatory evidence that is material to the Rigases' guilt

or punishment. Instead, the opposition relies upon an outdated interpretation of the Government's disclosure obligations under *Brady* to justify withholding the information provided by Rothenberger and misleading the defense about the scope of the information provided by Rothenberger. The Government plainly did not provide all of the exculpatory evidence that it had from Rothenberger to the Rigases. Most of this exculpatory information was not known to the Rigases until after the criminal trial. The Government's abbreviated and insufficient disclosure concerning Rothenberger actually misled the defense as to what exculpatory information he knew. For all these reasons, the Rothenberger interview notes that were withheld by the Government must be produced now.[1] For similar reasons, the Government should also produce interview materials from other Buchanan Ingersoll attorneys and representatives from Scientific Atlanta, Motorola, and the banks. Finally, the Government should identify and produce any *Brady* information from the SEC.

THE ROTHENBERGER NOTES MUST BE PRODUCED

Brady v. Maryland, 373 U.S. 83 (1963) places an affirmative duty upon the Government to produce any favorable evidence to the defendant that is material to either guilt or punishment. In its oppo-

[1] For purposes of this Motion the Court need not determine whether the Government violated its *Brady* obligations by not turning over its notes of the Rothenberger interview before trial. Rather, at this juncture, the Court need only determine whether the Government should turn over the notes from the interviews of Rothenberger and other relevant witnesses now. As set forth below, applicable law requires that the requested interview notes should be turned over to the defense.

sition, the Government correctly notes that it "may fulfill its *Brady* obligations with respect to a particular witness by identifying the witness to the defendant **and** indicating that the witness may have favorable information **on a particular subject**." Reply, at p. 3 (emphasis added). Just last year, the Second Circuit Court of Appeals clarified that

> Brady information must be disclosed . . . in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial. Thus, the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously. . . . **Similarly, disclosures must be sufficiently specific and complete to be useful.**

United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007) (emphasis added); *See also Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (disclosure of identity of witness without specifying information in witness' position insufficient under *Brady*). When a disclosure is made on the eve of trial, it may be "insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage." *See Leka*, 257 F.3d at 101.[2]

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[2] Although the opposition initially admits that the Government has an obligation to identify the particular subject matter about which the witness may have favorable information, it then cites cases for the proposition that the Government need only provide the defense with the names of witnesses and inform them that these witnesses may possess information helpful to the defense. *See United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988); *United States v. LeRoy*, 687 F.2d 610, 618-

The Government identified Rothenberger, on the eve of trial, as a witness who might have favorable information regarding the timber transaction – a very small part of the criminal case against the Rigases. The Rigases now know from the civil deposition of Rothenberger, which took place about two years after the Government interview, that the focus of the Government interview was not the timber transaction. Indeed, when asked which subjects the Government asked him about during the two-day interview, Rothenberger did not even mention the timber transaction. Rather, he recalled being questioned about the Rigases' 13-D filings, press releases and/or other SEC filings related to the Rigases' stock purchases and Form 4s filed by the Rigases. [Carl Rothenberger Deposition Transcript ("Roth. Tr.") (Supplemental Declaration, Ex. 1) at pp. 31-32.] The Government did not disclose to the defense that Rothenberger could provide favorable information on any of these subjects, particularly the Rigas stock purchases, even though it is now clear that he could have done so.

The Government attempts to excuse its failure to identify the subjects about which it interviewed

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19 (2d Cir. 1982); *United States v. Brown*, 582 F.2d 197, 200 (2d Cir. 1978); *United States v. Ruggiero*, 472 F.2d 599, 604-05 (2d Cir. 1973); *United States v. Frank*, 11 F. Supp. 2d 322, 327 (S.D.N.Y. 1998); *United States v. Upton*, 856 F. Supp. 727, 751-52 & n. 18 (E.D.N.Y. 1994); *United States v. Oshatz*, 700 F. Supp. 696, 698 (S.D.N.Y. 1988). Each of these cases, however, was decided prior to the Second Circuit's decisions in *Rodriguez* and *Leka*. *Rodriguez* and *Leka* are more directly applicable to the facts presented in this case and, to the extent that their holdings are inconsistent with the earlier and outdated authority cited in the Government's opposition, *Rodriguez* and *Leka* are controlling.

Rothenberger by arguing that the defense was in possession of the information that Rothenberger disclosed to it prior to the criminal trial. To support that argument, the Government cites portions of the instant Motion that cite information learned in a civil deposition of Rothenberger about two years after the criminal trial. The Government has no evidence (because there is none) suggesting that the defense knew of the favorable Rothenberger information known to the Government prior to the criminal trial.[3] Indeed, Buchanan's public pre-trial statements led the Rigases to believe that Rothenberger and other Buchanan lawyers would not testify to information favorable to the defense. *Rigases Decry Adelphia Charges*, Toronto Mail & Globe, April 19, 2003, *available at* 2003 WLNR 14078916.

Moreover, most of the testimony given by Rothenberger in his post-trial civil deposition was not known to the Rigases prior to the criminal trial. For example, although the Rigases knew that Buchanan Ingersoll attorneys reviewed and provided advice on Adelphia's securities filings and relied upon that knowledge, they did not know which particular

[3] This case presents an even clearer case for production of interview notes than the recent order from the Fifth Circuit Court of Appeals in the criminal case against Jeffrey Skilling relating to Enron. In the *Skilling* case, defendant Skilling had sought the raw FBI notes from the interview of Andrew Fastow, a Government witness, that formed the basis for composite memoranda drafted by the FBI and produced to the defense. The Fifth Circuit reversed the district court who declined to order the production of the raw notes. *United States v. Skilling*, No. 06 20885 (5th Cir. filed Nov. 28, 2007) [Supplemental Declaration, Ex. 2]. Here, not only has the Government refused to produce the notes but did not even produce a summary memorandum of the information provided by Rothenberger during his two day interview by the Government.

Buchanan attorneys were involved in specific filings or portions of filings. The Rigases did not know, and could not have known, about specific exculpatory conversations between Rothenberger and other members of Adelphia's management team regarding specific issues such as the marketing support agreements.[4] Because the Rigases have not yet been permitted to review the Rothenberger notes, it is impossible for them to state what additional information contained in those notes they did not have.[5]

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[4] The parties to these conversations were Rothenberger, Tim Werth and others who either were cooperating government witnesses or otherwise refused to talk to the Rigas defense team.

[5] That the Rigases' counsel attempted to interview Buchanan Ingersoll attorneys prior to trial further confirms that the Rigases were not aware what those lawyers would say about the transactions identified in the Bill of Particulars. Although the Government contends that the Rigases' "contentions about Rothenberger have evolved since their Rule 33 Motion," this is not a situation where the Rigases changed their story regarding representations made by Buchanan Ingersoll's lawyers after this Court denied the Rigases' Rule 33 Motion in order to have a second bite at the apple. Rather, the Government is confusing two separate conversations between Rigas defense counsel and attorneys for Buchanan Ingersoll. Specifically, the Rule 33 Motion refers to a conversation between criminal counsel for John Rigas and the attorneys for Buchanan Ingersoll. (Rule 33 Motion p. 46). The reference in the instant Motion is to a separate conversation between the undersigned counsel and attorneys for Buchanan Ingersoll regarding Rothenberger in particular. (Motion p. 4) Rather than undermining the Rigases' position, the fact that two separate lawyers had two separate conversations seeking interviews with Buchanan Ingersoll attorneys confirms the Rigases' used their best efforts to obtain the information known to the Government and not disclosed. Considering Rothenberger's refusal to talk with the Rigases and the Government's representation that the favorable testimony that Rothenberger would have provided involved the timber transaction, it would have been irrational for the Rigases to

The Government further claims that its one-sentence February 24, 2004 letter informing the Rigases that Rothenberger may be able to provide favorable information to the defense concerning the timber transaction was sufficient to satisfy its *Brady* obligations. If Rothenberger had only provided favorable information regarding the timber transaction, the February 24, 2004 letter would have come closer to satisfying the Government's *Brady* obligation. But Rothenberger's subsequent civil deposition confirms that he told the Government much more. The Government does not now suggest that the favorable information provided by Rothenberger was limited to the timber transaction. By specifically referring only to the relatively insignificant timber transaction, the Government gave the decided impression that the information that it had about Rothenberger did not include favorable information with respect to any of the other more significant transactions that were discussed in the Bill of Particulars. The Government's opposition provides no rationale for why it only disclosed the timber transaction despite the fact that the interview covered much more significant topics or why it decided not to disclose the source of its information, *i.e.*, that Rothenberger had actually been interviewed.

Under *Leka*, since the disclosure came on the eve of trial, it was necessary for it to be fuller and more thorough than if the disclosure had been made earlier. *Leka*, 257 F.2d at 101. Because the February 24, 2004 disclosure identified only one small transac-

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subpoena Rothenberger and "take him 'cold' not knowing what he might say." [Fleming Affidavit (Supplemental Declaration, Ex. 3) p. 8]

tion, and did not identify the source of the Government's information, even though Rothenberger gave exculpatory information on a variety of subjects, the disclosure was not sufficiently specific and complete to be useful and certainly did not satisfy the heightened standard applicable to the late disclosure.

Courts have held that "defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant." *United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005). In *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986), the Government informed the defendant of audiotapes containing potentially exculpatory information but told the defendant's defense counsel that the tapes would be of no value to his defense. *Id.* at 690. The Government asserted that the defendant's counsel was aware of some of the potentially exculpatory facts and could have inquired about the remaining facts but declined to further inquire about the details. The court rejected the Government's assertion and found that the defendant could not request any details about the potentially exculpatory information because he did not know such information even existed. *Id. See also Hughes v. Hopper*, 629 F.2d 1036, 1039 (5th Cir. 1980) ("defense counsel's knowledge of the [evidence is] effectively nullified . . . when prosecutor misleads the defense into believing the evidence will not be favorable to the defendant.").[6] Similarly, here, the

[6] Moreover, having produced witness statements for over 150 people, including memoranda of interviews of Rothenberger conducted by counsel to Adelphia's Special Committee and the interview notes from over 70 of those interviews, the Rigases' defense counsel was entitled to assume that the Government

Government chose only to mention that Rothenberger might be able to provide favorable information regarding the timber transaction, omitting any reference to favorable information regarding the other, more important topics in the Bill of Particulars. Therefore, even if the Rigases had believed that Rothenberger could provide favorable information on other topics such as Adelphia's SEC filings, that belief was effectively nullified by the February 24, 2004 letter's limited statement regarding the timber transaction.

This Court should also reject the Government's attempt to confuse the legal standard for producing exculpatory evidence with the legal standard under Rule 33 for obtaining a new trial. The Government suggests, without any authority, that this Court should not permit the Rigases to review the Rothenberger notes because the Court has already denied the Rigases' Rule 33 Motion. Although it remains to be seen whether the information set forth in the Rothenberger notes could provide a basis for renewing the Rigases' Rule 33 Motion or for a habeas cor-

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had produced all exculpatory materials. *Banks v. Dretke*, 540 U.S. 668, 693-694 (2004) (Brady violation occurs when the Government represents it operates an "open file" policy but fails to include exculpatory material, regardless of whether the defendant could have discovered the information in question); *Strickler v. Greene*, 527 U.S. 263, 283-284 n.25 (1999) ("if a prosecutors asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady"); *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004) ("[t]hough defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation").

pus petition, that issue is properly decided after the Rigases review the Rothenberger notes. For present purposes, the only issue before the Court is whether under *Brady*, the Government should be required to produce the Rothenberger notes because they may contain favorable information.

Significantly, the Government's *Brady* obligation pertains to favorable evidence that is material to either guilt or punishment. The information contained in the Rothenberger notes may well be material to this Court's determination of the Rigases' punishment at resentencing. The details of Rothenberger's involvement in the major issues at trial (coborrowing disclosure, disclosures relating to stock purchases, marketing support agreements) bears upon the relative culpability of the Rigases' and must be considered in determining their sentences. Under 18 U.S.C. § 3553(a)(1), this Court has an obligation at sentencing to consider "the nature and circumstances of the offense," and these materials are very relevant to a complete understanding of the nature and circumstances of the offenses of conviction in this case. Accordingly, they should promptly be produced so that any relevant information can be included in the Rigases' submissions regarding resentencing.

THE GOVERNMENT SHOULD ALSO BE REQUIRED TO PRODUCE INTERVIEW MATERIALS FROM OTHER BUCHANAN INGERSOLL ATTORNEYS, SCIENTIFIC-ATLANTA, MOTOROLA, AND BANKERS

The Government further argues that the Rigases should not be entitled to review the interview materials from the other witnesses identified in this Motion. Although the Government claims that there was no *Brady* disclosure triggered by these inter-

views, it does not expressly state that these witnesses did not provide material information that might have been favorable to the Rigases. Indeed, given the subsequent deposition testimony of some of these witnesses, it is clear that the Government interview notes are highly likely to contain exculpatory material.

The Government argues that the Rigases were aware of the existence of all these witnesses and failed to take any steps to procure the testimony of these witnesses. The cases that the Government cites to support its assertion that identifying witnesses is enough to satisfy its *Brady* obligations were all decided before *Rodriguez* and are, therefore, no longer applicable. Under binding Second Circuit precedent, the Rigases are entitled to both the identity of the witnesses who may have favorable information and a disclosure of such information that is sufficiently specific and complete to be useful. The Government has not met this standard.

Unlike the cases cited by the Government, although the Rigases knew generally that other Buchanan Ingersoll attorneys and representatives from Motorola, Scientific-Atlanta and banks would have exculpatory information, they did not know which individuals from these institutions would possess relevant information and the scope of that information. Indeed, the Rigases did take steps "to interview relevant personnel from . . . Scientific Atlanta and Motorola, and Buchanan," but were unable to secure any interviews. [Fleming Affidavit (Supplemental Declaration, Ex. 3] pp. 5-6). Without these interviews, it was impossible to know which individuals to consider calling at trial. Notably, this is not a situation where the Government identified particular representatives from these entities but refused to

disclose the substance of the information they possessed. Rather, the Government did not disclose the interviews at all or identify the particular witnesses that it interviewed. Accordingly, the Government should now be ordered to identify the witnesses it interviewed and provide the relevant interview notes relating to such interviews.

THE GOVERNMENT SHOULD BE ORDERED TO IDENTIFY AND PRODUCE THE SEC'S INTERVIEW NOTES

The Government concedes that its Brady obligations extend to information in the possession of the SEC. Yet, the Government does not say that it has reviewed the information in the possession of the SEC to determine whether such information may be favorable to the Rigases. Rather, the Government has "satisfied" itself based upon a conversation with the SEC. Delegation of a determination that the Government is required to make under Brady is not sufficient. This is especially true because the issues involved in the SEC actions involving Mulcahey and Dearlove do not mirror the allegations made by the Government in the Bill of Particulars and because, according to the Government, its investigation was conducted separately from that of the SEC. Therefore, there is good reason to believe that the SEC would not be able to make the determination that Brady requires the Government to make.

The Government's reliance on Rule 16 reveals why the Government did not itself review the materials – it is trying to hide behind supposed limitations in Rule 16 by not being "in possession" of the interview notes from the SEC. Despite the Government's protestation that it is not engaging in an exercise of formalism, clearly it declined to discharge its obliga-

tions under *Brady* in order to try and take advantage of a formality under Rule 16.

Even if the Government could escape its obligation to produce the interview materials by delegating its responsibilities to the SEC, it has not made the required showing that it and the SEC did not engage in "cooperative activity" with respect to the allegations brought against the Rigases. *United States v. Shakur*, 543 F. Supp. 1059, 1060 (S.D.N.Y. 1982). In addition, the "prosecution must disclose documents material to the defense (1) that it has actually reviewed, or (2) that are in the possession, custody, or control of a government agency so closely aligned with the prosecution so as to be considered part of the 'prosecution team.'" *United States v. Chalmers*, 410 F. Supp. 2d 278, 289-90 (S.D.N.Y. 2006). *See also United States v. Griffen*, 379 F. Supp. 2d 337, 343 (S.D.N.Y. 2004) ("Documents that the Government has reviewed or has access to must be provided to aid a defendant in preparing his defense."). In this case, the criminal complaint, the SEC's complaint against the Rigases and Adelphia's complaint against the Rigases were on three successive days, indicating an obvious coordination among those three entities. [Supplemental Declaration Exs., 4, 5 & 6] Indeed, when the SEC filed its complaint against the Rigases, the Commission acknowledged "the assistance and cooperation by the U.S. Attorney's Office for the Southern District of New York and the U.S. Postal Inspector Service in this matter." [Supplemental Declaration, Ex. 7] It was a Postal Inspector who attended Chris Clark's interviews with Rothenberger and took notes. [Roth. Tr. p. 30] In April 2005, the SEC announced that it and the United States Attorney's Office reached an agreement with the Rigases

to settle a civil enforcement action and resolve criminal charges against Adelphia and John, Tim, Michael and James Rigas. In announcing the settlement, the SEC again acknowledged the assistance of the U.S. Attorney's Office. [Supplemental Declaration, Ex. 8] Considering the significant cooperation identified in the SEC's press releases, the U.S. Attorney's Office, the SEC, and the Postal Inspector Service are part of the same "prosecution team."

Moreover, both the Government and the SEC relied heavily on the investigation of the Covington law firm that nominally represented Adelphia's Special Committee. According to Government witness Dennis Coyle, the investigation conducted by Covington was "co-opted" by the Government. [Dennis Coyle Deposition Transcript (Supplemental Declaration, Ex. 9) pp. 640-41.] Given the Government's involvement in that investigation and the SEC's reliance on it surely the Government and SEC engaged in sufficient "cooperative activity" to deem the information in the possession of the SEC to be in the possession of the Government for purposes of Rule 16. *See United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("An individual prosecutor . . . 'has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case . . . .'") Therefore, the SEC's interview notes should be promptly produced.

CONCLUSION

For all of the foregoing reasons, and for the reasons previously set forth in the Rigases' initial Motion, the Rigases' respectfully request that this Court grant their Motion to Compel Production of Notes Taken During Government Interviews.

Respectfully submitted,

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VIA FEDERAL EXPRESS

September 1, 2009

The Honorable Preet Bharara
United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

Dear Mr. Bharara:

This Firm, along with Viet D. Dinh of Bancroft Associates PLLC, serves as counsel to John J. Rigas and Timothy J. Rigas in *United States v. Rigas*, No. 08-3485 (2d Cir. filed July 15, 2008). We write out of respect for your personal integrity and the long-standing traditions of fairness of Office for the U.S. Attorney for the Southern District of New York.

The above-referenced matter relates to a motion to compel production of interview notes under *Brady v. Maryland*, 373 U.S. 83 (1963). As described below, the decision at the time of the criminal trial to withhold exculpatory notes from the interview of one of the most important witnesses in the case raises serious questions of prosecutorial misconduct. Although there are other instances of similar misconduct in this case, at this time we seek your review

of the prosecutors' decision not to disclose the requested materials.

I. Background

The Rigases were convicted in July 2004 of securities and bank fraud charges arising out of their roles as officers and directors of Adelphia Communications Corporation ("Adelphia"). The government produced notes and documents from over 70 witness interviews, but omitted any materials relating to any interview with Carl Rothenberger, a partner in the law firm of Buchanan Ingersoll PC. Buchanan Ingersoll had served as Adelphia's corporate counsel since before the company went public in 1986, and as its securities counsel from 1986 on. For most of those years, Mr. Rothenberger was the law firm's senior securities expert. According to Rothenberger's firm biography, he "counsels companies, directors, officers and shareholders on the pervasive regulatory framework of the SEC, stock exchanges and NASD, as well as on matters of disclosure, investor relations, governance and general corporate law." It notes that he is included in the Corporate Category of *The Best Lawyers in America*," and that "in 2006, he was selected as a Pennsylvania Super Lawyer." (Website of Buchanan Ingersoll and Rooney PC). In a civil deposition subsequent to the Rigas criminal trial, Rothenberger acknowledged that he was the person to whom the company turned for securities and disclosure questions, including on the critical issue of how to disclose the co borrowing arrangements between Adelphia and the Rigases. (A-1267-80, 1321-22.)

Unbeknownst to defendants or their lawyers, prosecutor Christopher Clark and a United States postal inspector conducted a two-day interview of Rothen-

berger on the eve of trial in February of 2004 while jury selection was occurring. Defendants did not find out about this interview until September 12, 2007 when I met with Assistant U.S. Attorney William Johnson, the lawyer within the Southern District of New York (SDNY) then responsible for the Rigas case, to present newly-discovered evidence exculpatory to the Rigases. At Mr. Johnson's invitation, Christopher Clark and Richard Owens, the main prosecutors at trial (who by then were in private practice), attended this meeting. Much of the new information centered on what outside professionals from Buchanan Ingersoll and Deloitte Touche knew during the period covered by the indictment, 1999-2002. The evidence came to the Rigases largely from a series of depositions taken in civil cases subsequent to the criminal trial, particularly in Adelphia v. Deloitte v. Rigas. The essence of the information uncovered in these depositions was that the Buchanan and Deloitte professionals not only knew about everything that had occurred at Adelphia in the relevant years, but they had either performed the work themselves or reviewed carefully and approved work done by Adelphia employees, especially as it related to the accounting and disclosure practices at the company.

When presented with this information, Mr. Clark quickly said that none of this was new to the government, that in fact he and others had learned much of it in a two-day interview he had conducted with Rothenberger in February of 2004. Mr. Clark further indicated that the Rigas defense team had known about the interview, and the information gleaned from it, because notes taken during the session had been turned over to Rigas lawyers.

The Rigas defense team, however, knew nothing about an interview or interview notes. All they received was a one-sentence letter: "The government writes to inform you that Carl Rothenberger, Esq. may be able to provide information that is favorable to the defense concerning the timber rights transaction discussed in the government's Bill of Particulars."

The timber rights transaction was a minor event at the very periphery of the government's case. The letter did not mention that Rothenberger had been interviewed or that he possessed information on any other far more important topics. Moreover, the information could have come from a number of different sources. In fact, material which had previously been turned over to the Rigases already indicated that Rothenberger may have had information that was "favorable to the defense concerning the timber rights transaction." (ADEL 0018708.)

The day after the meeting at SDNY offices, I telephoned William Johnson to request the notes referred to by Mr. Clark. Mr. Johnson expressed disbelief that such notes existed, insisting that the Justice Department takes extraordinarily seriously its obligation to produce exculpatory information and has stringent safeguards to ensure that such information is fully disclosed to defendants. If any notes did exist, he assured me, they would have already been provided. After looking into the situation further, however, Mr. Johnson on September 21 confirmed that there were notes from the Rothenberger interview and that they in fact had not been produced. Although not denying that they contained exculpatory material, Mr. Johnson refused to turn over the notes.

On October 15, 2007, I requested in writing the Rothenberger notes along with 1) notes from other pre-trial interviews that had been conducted without defendants' knowledge and that were highly likely to have produced exculpatory evidence[1]; 2) notes from the SEC's preparation of James Brown in its civil cases against Michael Mulcahey, Adelphia's Vice President and Assistant Treasurer, and Gregory Dearlove, a Deloitte partner who managed the Adelphia audit during the critical years of 2000 and 2001. Again, Mr. Johnson refused to supply the notes, again without denying that they were exculpatory. The Rigases filed a motion to compel, which was denied by the District Court, an appeal from which is pending before the Second Circuit.

II. Rothenberger Role and Knowledge

The natural implication of the government's short pre-trial notification had been that the government did not have any other exculpatory information from Mr. Rothenberger. This turned out to be false. Without question, Carl Rothenberger is one of the two or three most knowledgeable people in the Adelphia case. Beginning in the late 1980's and continuing until 2002, he represented both Adelphia Communications Corporation and the Rigas family on securities matters. He drafted, reviewed, and approved all of the Company's public and SEC filings. He was intimately familiar with both Adelphia's financial structure and the status of Rigas financings. He had

[1] Defendants, for example, were never informed of interviews that had occurred with representatives of Scientific Atlanta and Motorola regarding certain marketing support transactions between the vendors and Adelphia. In civil depositions, these same witnesses strongly contradicted the government's allegations that these transactions were shams.

unfettered access to Adelphia employees for information and knowledge. In subsequent depositions in *Adelphia v. Deloitte & Touche*, Mr. Rothenberger provided testimony that was highly exculpatory of the Rigases' guilt and specifically, their state of mind in acquiescing in advice provided by their lawyers, accountants, and auditors. For example, when asked whether he found "any legal inadequacies or deficiencies in the disclosures that were made by Adelphia and their public filings with respect to the co-borrowing facilities," Mr. Rothenberger answered that, "[a]t the time of each such filing, my general recollection is that I did not reach that conclusion." Deposition of Carl Rothenberger at 1439, *Adelphia v. Deloitte & Touche*, No. 02-598 (Pa. Ct. Com. Pl. Phila. Co. Sept. 26, 2005). Further, he stated that he did not recall "advis[ing] the Rigases, while the Rigases were in control of Adelphia, that they should amend that disclosure relating to the Rigas co-borrowing." *Id.* at 1281.

Rothenberger further testified that he had previously provided the same information to the government in an interview with prosecuting attorneys on the eve of the Rigas criminal trial. When asked what subjects were covered in this interview, Mr. Rothenberger stated that he "recall[ed] questions about schedule 13-D filings which were made on behalf of the Rigas family" and "either press release disclosure or SEC filing disclosure or perhaps both." *Id.* at 31-32.

Recognizing that Rothenberger was key to the Rigas defense, the government went to great lengths to keep him out of their reach. An employee memo from Adelphia's general counsel in October 2002, possibly at the instigation of the government, prohibited any communications with family members about their

defense (see below for further discussion). All civil discovery, at the government's request, was stayed in 2003. The Rigases had no pre-trial access to Rothenberger, whose attorney had informed the Rigas attorneys that he would not let Rothenberger talk to the Rigases, and that if they issued a subpoena for him to testify he would invoke his Fifth Amendment privilege[2]. (A-1223) Prior to Rothenberger's testimony in *Adelphia v. Deloitte*, then, the Rigases were left in the dark about what he would say concerning his work at Adelphia or the advice he had given to the company or to the family.

Despite the obvious relevance of the Rothenberger interview notes to the Rigases' defense, the government has resisted even to produce them *in camera* for the Court's review. The Rigases' motion to compel now resides at the Second Circuit Court of Appeals. In the government's response to Appellant's brief, the government's position on the notes changed again. After more than a year and a half, in which it had consistently taken the same position before the District Court, the government represented – for the first time – that the Rothenberger notes are not exculpatory. In the oral argument on May 5, 2009, Mr. Johnson stated to the Court, "I have reviewed those notes personally, the Rothenberger notes. I have discussed them with the postal inspector who took them and the Assistant United States Attorney who was present at the time of the interview and there is nothing exculpatory in those notes beyond the limited disclosure that was made concerning

[2] This attorney had also informed the Rigases that Rothenberger would not be speaking to the government, a representation which obviously proved to be false.

the timber rights association." Transcript of Oral Argument, *U.S. v. Rigas*, et al., No. 08-3485 (2d Cir. May 5, 2009) (attached hereto as Exhibit A).

Judge Cabranes questioned the government's rationale for refusing to produce the notes.

> Judge Cabranes: On remand to Judge Sand wouldn't it have been simpler and more expeditious to provide those notes to him so that he could make his decision?
>
> Appellee: It may have been, Your Honor, but what we are trying to do is to –
>
> Judge Cabranes: What I'm trying to get at is what is the downside, as a practical matter.
>
> Appellee: The downside is creating a precedent for in every case when a defendant claims there must be something exculpatory that it would – and we are talking about a small amount of material here, there may be situations where, and I can actually see it from the arguments made in this case, that in fact the district judge to review all the interview notes of witnesses who did not testify and were not turned over to the defense either under Giglio theory or 3500 material, and that's going to put substantial burden on the District Court to familiarize themself with the facts that could make understanding of the nature of that material relevant to deciding whether it's Giglie or Brady.
>
> Judge Cabranes: That may be true in many cases but from what you say in this case it would have been extraordinarily simple.
>
> Appellee: It may have been. It may have been.

(Transcript of Oral Argument, U.S. v. Rigas, et al., No. 08-3485 (2d Cir. May 5, 2009), pp. 16-17, attached as Exhibit A.)

As Judge Cabranes noted, any burden on the government in this case would be negligible, since by the government's own admission the interview notes amounted to only five or six pages.

> Judge Cabranes: Give me a sense of the physical dimensions of the material we are talking about.
>
> Appellee: The notes?
>
> Judge Cabranes: The notes, yes.
>
> Appellee: I believe it is under five or six pages.
>
> Judge Cabranes: Five or six pages typed?
>
> Appellee: Handwritten notes.

(Exhibit A, p. 16.) The government's argument is particularly troubling given the fact that the government produced thousands of pages of notes from interviews of at least 75 potential witnesses at the time of trial including those from secretaries and a property caretaker. For it to contend that it would be unduly burdensome to produce another five or six pages of notes from a truly central participant in the Adelphia case is a poor excuse.

III. The Government's Obligation under *Brady*

We are concerned that the government's shifting position on the Rothenberger notes indicates that it has not fully met its obligations under *Brady* and its progeny.

First, Mr. Johnson was not part of the original trial team and therefore may not fully appreciate the

weight of materials showing advice of counsel in negating the Rigases' criminal intent.

Second, we are concerned that Mr. Johnson's representation to the Court is based on the government's ex post view of the case, and not on the applicable standard of what the defense would consider to be potentially exculpatory. As the Supreme Court explained in *U.S. v. Dennis*, 384 U.S. 855 (1995), on some occasions prosecutors and judges may not make adequate materiality determinations regarding whether a particular piece of evidence is exculpatory, and in such circumstances: "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Id.* at 874-75 (holding that a grand jury transcript should have been produced in light of an adequate showing of "particularized need" and a minimal importance on keeping the transcript secret). Additionally, the Supreme Court in *Kyles v. Whitley*, 514 U.S. 419 (1995) stated that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence" as "such disclosure will serve to justify trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 439 (internal quotations omitted).

Third, the government is operating under a heightened obligation that its actions be fair and not misleading, wherein government disclosures "must be sufficiently specific and complete to be useful," *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007). When analyzing for such sufficiency and completeness, the *Brady* question is not whether non-disclosure was deliberate or from a "sloppy

thinking about the evidentiary significance of the material." *Leka v. Portuondo*, 257 F.3d 89, 102 (2d. Cir. 2001). Rather, the government's burden is to produce exculpatory evidence in a sufficient, timely, and complete manner "to afford the defense an opportunity for use." *Id.* Here, the government disclosure on the eve of trial that "Carl Rothenberger, Esq. may be able to provide information that is favorable to the defense concerning the timber rights transaction" is not only inadequate, it is presumptively misleading if not deliberately calculated to confuse the defense.

Fourth, although the Rigases were convicted of multiple counts, *Brady* does not require a showing that "disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, but only a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *U.S. v. Triumph Capital Group, Inc.*, 544 F.3d 149, 161 (2d Cir. 2008). Specifically, a *Brady* violation occurs where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Strickler v. Greene*, 527 U.S. 263, 279 (1999) (internal quotations omitted). As the Supreme Court pointed out in *Kyles*, in such a "reasonable probability" analysis, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 506. Highlighting the level of this "reasonable probability" standard's threshold, the *Kyles* Court notes that "the possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary

basis to convict," *Id.*, and thus disclosure of the notes is required for they undermine confidence in the verdict and may have led to acquittal on at least one charge.

Lastly, the non-disclosure of the Rothenberger notes is particularly troubling in light of other instances in which witnesses offered substantively different testimony at the criminal trial and subsequent civil trials – raising questions of whether prosecutors knew that its witnesses may have been offering disingenuous testimony. One of the most concerning examples is James Brown, the prosecution's most important witness and the only one who testified as to intent to commit fraud on the part of the Rigases. When testifying about co-borrowing transactions and other accounting matters, he stated that he "was involved in a lot of pretty bogus transactions while I worked at Adelphia." Testimony of James Brown at 06227, *United States v. Rigas*, No. 02-1236 (S.D.N.Y. Feb. 24, 2004). However, in a subsequent civil deposition, Brown stated that he believed the "allocation of co-borrowing debt on Adelphia's books between the Rigases and Adelphia" was "materially accurate," and that, with regard to the co-borrowed debt, he "did not think Adelphia would be called upon to pay that debt." Deposition of James Brown at 66, *SEC v. Adelphia*, No. 02-5776 (S.D.N.Y. July 10, 2006). These statements could hardly conflict more; and in light of the more than four hundred hours the government spent interviewing and preparing Brown for his criminal trial testimony, it is difficult to accept that prosecutors had no indication at any time that Brown may have been offering disingenuous testimony. Testimony of James Brown at 07163, *United States v. Rigas*, No. 02-1236 (S.D.N.Y. Mar. 1, 2004).

Additionally, in late 2002 Adelphia circulated to its employees a memorandum that the Rigases believe may have been the result of government influence. This memo – circulated shortly after the Rigases' indictment was returned, and after Adelphia began cooperating with the government under threat of indictment – directed Adelphia employees not to speak with the Rigases or their counsel, and stated that if an employee was found to have engaged in such communication, Adelphia would "refer the matter to appropriate government agencies." Affidavit of Peter Fleming Jr. at 6, *United States v. Rigas*, No. 02-1236 (S.D.N.Y. July 3, 2007). This memorandum, and the pressure it explicitly exerts upon Adelphia's employees to ensure that they did not assist the Rigases' defense team, are strongly reminiscent of the type of government overreaching which was recently repudiated in *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008).

President Obama and Attorney General Holder have consistently affirmed a commitment to "transparency" at all levels of government, including the way in which criminal prosecutions are handled. Press Release, White House, Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government (Jan. 21, 2009) (*available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment).

We are heartened that the Department of Justice, in keeping with these mandates, has in recent months emphasized utmost adherence to the dictates of *Brady v. Maryland* and has issued a ringing endorsement of attorney training in that regard: "[commitment] to ensuring that our prosecutors are provided sufficient training to understand fully their

discovery obligations, and that they receive the support and resources necessary to do their jobs in a manner consistent with the proud traditions of this Department." Press Release, Dep't of Justice, Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases (Apr. 14, 2009) *(available at* http://www.usdoj.gov/opa/pr/2009/April/09-opa-338.html). Attorney General Holder's recent statement, after the Motion to Set Aside the Verdict in *U.S. v. Stevens*, No. 08-231 (D.D.C. Apr. 7, 2009) and the Motion for Remand in *U.S. v. Kohring*, No. 08-30170 (9th Cir. Jun. 4, 2009) that "the Department's mission is to do justice, not just win cases, and when we make mistakes, it is our duty to admit and correct those mistakes." provides further reason for us to hope that some of the abuses of the past will not repeat themselves. Press Release, Dep't of Justice, Department Asks Alaska Corruption Cases be Remanded to District Court, Former State Representatives be Released (June 4, 2009) *(available at* http://www.usdoj.gov/opa/pr/2009/June/09-ag-550.html).

The issues we are raising with respect to Brady violations have relevance for both considerations of guilt and considerations of punishment. And while we have concentrated mainly on the undisclosed notes from the Rothenberger interview, the government itself in the oral argument has tacitly admitted that the Rigases were also uninformed of other important interviews conducted in the pre-trial period. (Exhibit A, p. 16.)

* * *

We submit that there is a palpable indication from the record that the Rothenberger notes are exculpa-

tory. We are at a loss as to how the withholding of five or six pages of handwritten notes can be justified alongside the President's call for transparency and Attorney General's commitment to *Brady* obligations. We therefore request that you review the matter to ensure that the Department lives up to the promise that "any case in which it is involved is handled fairly and consistent with its commitment to justice." Press Release, Eric Holder, Att'y Gen., Dep't of Justice, Statement of Attorney General Eric Holder Regarding *U.S. v. Stevens* (Apr. 1, 2009) (*available at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html). We believe that the only way for this goal to be accomplished is for the Rothenberger notes to be provided as soon as practicable to the Rigases and their attorneys. We make this request out of respect for the longstanding traditions of fair play and fealty to law exhibited by the Office of the U.S. Attorney for the Southern District of New York.

Very truly yours,

/s/ LAWRENCE G. MCMICHAEL
Lawrence G. McMichael

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No. 09-1456

In the Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners' motion to compel disclosure of notes of the government's interviews with petitioners' former corporate securities counsel.

2. Whether the district court abused its discretion in denying petitioners' motion to compel disclosure of notes of the Securities and Exchange Commission's interviews with petitioners' former corporate securities counsel and other witnesses.

3. Whether the district court erred in determining that the amount of loss attributable to petitioners for purposes of Sentencing Guidelines § 2B1.1(b) exceeded $100 million.

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In the Supreme Court of the United States

No. 09-1456

JOHN J. RIGAS AND TIMOTHY J. RIGAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 583 F.3d 108. An earlier opinion of the court of appeals (Pet. App. 65a-124a) is reported at 490 F.3d 208. Opinions and orders of the district court on resentencing (Pet. App. 34a-48a), denying petitioners' motion to compel (Pet. App. 49a-52a), and denying petitioners' motion for a new trial (Pet. App. 53a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2009. A petition for rehearing was denied on December 29, 2009 (Pet. App. 125a-126a). On March 19, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including

May 28, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiring to commit securities fraud, to commit bank fraud, and to make and cause to be made false statements in filings with the United States Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 371; 15 counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 15 U.S.C. 78ff; and two counts of bank fraud, in violation of 18 U.S.C. 1344. Petitioner John J. Rigas was sentenced to 15 years of imprisonment and petitioner Timothy J. Rigas was sentenced to 20 years of imprisonment. The court of appeals affirmed petitioners' convictions on all counts except one of the bank fraud counts, and it remanded for entry of acquittals on that count and for resentencing. The district court resentenced John Rigas to 12 years of imprisonment and resentenced Timothy Rigas to 17 years of imprisonment. The court of appeals affirmed. Pet. App. 1a-33a.

1. Adelphia Communications Corporation was one of the largest cable television providers in the United States. Petitioner John J. Rigas, who founded the company, was its President, Chairman, and Chief Executive Officer. Petitioner Timothy J. Rigas, John Rigas's son, was Adelphia's Executive Vice-President and Chief Financial Officer, and a member of its Board of Directors.

Beginning in the late 1990s, petitioners and others systematically looted the company's assets and deceived investors about material facts concerning Adelphia's

operations and finances. Petitioners' conduct included fraudulent stock purchases, sham transfers of debt, fraudulent misrepresentations of Adelphia's operating performance, defrauding Adelphia's bank lenders, and looting Adelphia's cash management system. Pet. App. 67a-81a.

On March 27, 2002, Adelphia publicly disclosed that it had approximately $2.2 billion in liabilities that it had not previously reported on its balance sheet. That day, Adelphia's stock price fell by approximately 25% to $20.39. By May 2002, the price had plummeted to $1.16 per share. In June 2002, Adelphia filed for bankruptcy, wiping out more than $4 billion in shareholder value. Pet. App. 67a-68a; Gov't 2006 C.A. Br. 6-7.

2. On July 30, 2003, a federal grand jury in the Southern District of New York returned a superseding indictment charging petitioners and others with conspiring to commit securities, wire, and bank fraud, to make and cause to be made false statements in SEC filings, and to falsify business records, in violation of 18 U.S.C. 371 (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) and 15 U.S.C. 78ff (Counts 2-16); wire fraud, in violation of 18 U.S.C. 1341 (Counts 17-21); and bank fraud, in violation of 18 U.S.C. 1344 (Counts 22 and 23). See Pet. App. 71a.

After a four-and-a-half-month trial, a jury found petitioners guilty of the substantive securities and bank fraud counts and of conspiring to commit securities and bank fraud and to make and cause to be made false statements in SEC filings. The jury acquitted petitioners of conspiring to commit wire fraud and of the substantive wire fraud charges. The jury deadlocked on whether petitioners conspired to falsify the books and

records of a public corporation. Pet. App. 65a-66a & n.1, 82a.

The district court sentenced John Rigas to 15 years of imprisonment, to be followed by six months of supervised release. The court sentenced Timothy Rigas to 20 years of imprisonment, to be followed by two years of supervised release. The court did not impose a fine or restitution order on either petitioner because the Rigas family had reached a settlement with the government under which the family agreed to forfeit more than $1 billion in assets. Pet. App. 3a-4a; Gov't 2008 C.A. Br. 3 & n.*.

3. The court of appeals affirmed petitioners' convictions on all counts except one of the bank fraud counts (Count 23). Pet. App. 65a-124a. The court reversed the convictions on that count and remanded the case for the entry of acquittals on that count and for resentencing. *Id.* at 124a. This Court denied a petition for a writ of certiorari. 552 U.S. 1242 (2008).

4. a. On remand, petitioners moved to compel the production of notes of pre-trial interviews with potential witnesses including Carl Rothenberger, Adelphia's lead outside securities lawyer. See Pet. App. 19a; *id.* at 170a-200a. The district court denied the motion. *Id.* at 49a-52a.

The district court first rejected petitioners' claim that, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), they were entitled to notes of an interview that prosecutors had conducted with Rothenberger shortly before trial. Pet. App. 49a-51a. As an initial matter, the court explained that, because Rothenberger was not called as a witness at trial, the government had no statutory obligation under the Jencks Act to turn over either Rothenberger's statements or the government's notes. *Id.* at

50a; see 18 U.S.C. 3500(a) ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.") As for petitioners' constitutional claim of entitlement to the interview notes, the court explained that "*Brady* does not require the government to turn over exculpatory evidence 'if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.'" Pet. App. 50a (quoting *United States* v. *Gaggi*, 811 F.2d 47, 59 (2d Cir.), cert. denied, 482 U.S. 929, and 483 U.S. 1007 (1987)). Here, finding that "[d]efendants knew of Rothenberger's existence, his role at Adelphia, and the facts on which he could testi[f]y[]," the court concluded that "the government's *Brady* obligation was satisfied." *Id.* at 51a. The court also rejected petitioners' argument that "the government's identification of only one issue on which Rothenberger possessed exculpatory information," concerning certain timber rights transactions discussed in the government's bill of particulars, see Gov't 2008 C.A. Br. 114, "nullified their information on what his testimony would be." Pet. App. 51a (internal quotation marks omitted).

The district court also rejected petitioners' claim that they were entitled to notes from interviews conducted by the SEC during its civil investigation of Adelphia. Pet. App. 52a. The court reasoned that "the United States Attorney's Office is not obligated to produce documents that are not within its 'possession, custody, or control.'" *Ibid.* (quoting Fed. R. Crim.

P. 16(a)(1)(E)). Here, the court concluded, "there was no joint investigation with the SEC, and the United States Attorney's Office cannot be obligated to produce documents in the custody of the SEC." *Ibid.*

b. The district court subsequently resentenced petitioners. Pet. App. 34a-48a. In light of the reversal of petitioners' convictions on Count 23, the district court reduced both petitioners' sentences, resulting in a term of imprisonment of 12 years for John Rigas and a term of imprisonment of 17 years for Timothy Rigas. *Id.* at 38a-40a, 46a-48a.

Petitioners argued that the district court should also reduce the sentences it had earlier imposed on other counts. Among other things, they argued that the court should revisit its imposition of a 26-level enhancement under Section 2B1.1 of the advisory Sentencing Guidelines based on a finding that petitioners' fraud caused a loss of at least $100 million. Pet. App. 41a-42a. The court rejected the argument. *Id.* at 41a-44a. The court explained that, contrary to petitioners' argument that "the Government must prove loss causation with precision," Guidelines § 2B1.1 requires only that a court make a "reasonable estimate" of the loss. *Id.* at 42a (quoting *United States* v. *Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007), cert. denied, 553 U.S. 1060 (2008)). The court noted that, when Adelphia disclosed a previously unreported $2.2 billion in liabilities, its "stock price plummeted by about twenty-five percent to $20.39; by the time the stock was delisted in May 2002, the price per share was $1.16. The company filed for bankruptcy in June 2002, wiping out all shareholder value." *Id.* at 43a (internal quotation marks and citation omitted). Relying on the government's brief, the court also noted that, "[i]n order for there to be more tha[n] $100 million

in losses to the common equityholders only, there would need only be a reduction in market price, caused by the criminal conduct for which the defendants stand convicted, of merely $0.50." *Ibid.* (internal quotation marks and citation omitted). Although petitioners had "point[ed] to other loss factors," the court concluded that "the numbers here are of such scope, the immediate press reaction to the disclosure of over two billion dollars in undisclosed debt so compelling that the claim that there was not a reasonable calculation of a loss of at least $100 million borders on the frivolous and is not made any less meritless because it is the subject of 'expert' analysis." *Id.* at 44a-45a.

5. The court of appeals affirmed. Pet. App. 1a-33a. The court rejected petitioners' challenges to the district court's decision on resentencing, including to the district court's loss calculation. The court of appeals "agree[d] with the District Court and the government that, regardless of the precise amount of the loss attributable to the Rigages' fraud, that figure easily exceeds $100 million." *Id.* at 19a.

The court of appeals also held that the district court did not abuse its discretion when it denied petitioners' motion to compel the production of interview notes. Pet. App. 30a-32a. Specifically, the court of appeals "detect[ed] no error" in the district court's conclusion that the government had no statutory or constitutional obligation to turn over its interview notes with Rothenberger, "since [petitioners] knew of Rothlenberger's role at Adelphia and the facts about which he could testify." *Id.* at 31a-32a. The court of appeals similarly upheld the district court's conclusion "that the United States Attorney's Office was not in possession of the notes from SEC interviews with Rothenberger or other witnesses, and

did not have an obligation to disclose what they did not possess." *Id.* at 32a.

ARGUMENT

1. Petitioners contend (Pet. 16-27) the government had a constitutional duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to turn over notes taken during the government's interview with Rothenberger, Adelphia's lead outside securities lawyer, and that the district court therefore erred in denying petitioners' motion to compel production of the interview notes. The court of appeals correctly rejected petitioners' contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

a. To establish a *Brady* claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to the establishment of his guilt or innocence. *Brady*, 373 U.S. at 87. Evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)).

The court of appeals in this case correctly concluded that the government had no obligation under *Brady* to turn over the notes of its interview with Rothenberger. The *Brady* rule is designed to ensure disclosure of "information which had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976). Here, the district court found that "defendants knew of Rothenberger's role at Adelphia and the facts about which he could testify." Pet. App.

31a. The court of appeals accordingly concluded that the government had not suppressed evidence in violation of *Brady*. *Id.* at 31a, 32a.

b. Focusing on the court of appeals' citation of circuit precedent stating that "[n]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence," Pet. App. 31a (quoting *United States* v. *Gaggi*, 811 F.2d 47, 59 (2d Cir.), cert. denied, 482 U.S. 929, and 483 U.S. 1007 (1987)), petitioners contend (Pet. 16-20) that this Court's review is warranted to resolve a conflict in authority about whether the government's *Brady* obligations apply to facts that a defendant "should have known," that the defendant "could have ascertained through the exercise of 'reasonable diligence,'" or of which the defendant had "actual knowledge." Petitioners' contention does not warrant this Court's review.

As an initial matter, petitioners overstate the degree of disagreement among the courts of appeals. Notably, petitioners fail to identify any substantive difference between a "should have known" standard and a "reasonable diligence" standard, and courts often use the two formulations interchangeably. See, *e.g.*, *United States* v. *Skilling*, 554 F.3d 529, 575 (5th Cir. 2009) (using both formulations), aff'd in part and vacated in part on other grounds, 130 S. Ct. 2896 (2010); *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991) (same).[1] And

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[1] Petitioners allow that "the 'should have known' and 'reasonable diligence' standards may operate similarly in some cases," but assert that "their difference is pronounced in cases, like this one, where the exculpatory evidence is 'contained in a witness's head,' rather than a document." Pet. 17. Petitioners fail to elaborate on the assertion, however, and the cases they cite for support do not demonstrate any sub-

although petitioners correctly note that other courts have sometimes appeared to reject both formulations, see Pet. App. 18 (citing cases); *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966), the disagreement is not as sharply drawn as petitioners suggest. The Ninth Circuit has found a *Brady* violation where police inspectors withheld the statements of a witness whom the defendants may have known to have exculpatory information (although they did not know the extent of that information or the witness's last name). *Tennison* v. *City & County of San Francisco*, 570 F.3d 1078 (2008). That court has also, however, stated that, "where the defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression." *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009) (internal quotation marks and citation omitted). And although the Tenth Circuit has stated that "the fact that defense counsel 'knew or should have known' about [exculpatory] information * * * is irrelevant to whether the prosecution had an obligation to dis-

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stantive difference in legal approach in cases involving information "contained in a witness's head." See *Boss* v. *Pierce*, 263 F.3d 734, 740-741 (7th Cir. 2001) (noting that "it is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses," particularly when the witness is "uncooperative or reluctant"), cert. denied, 535 U.S. 1078 (2002); *United States* v. *Schledwitz*, Nos. 95-5309 and 95-5409, 1995 WL 712755, at *5 (6th Cir. Dec. 4, 1995) (per curiam) (unpublished) (holding that the defendant in that case "had to be aware" of the opinions of an individual interviewed by the FBI, where the individual "was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about [the defendant's] role in [his] banking maneuvers," and defense counsel had interviewed him before trial) (first and third brackets in original; citation omitted), cert. denied, 519 U.S. 948 (1996).

close," it has nevertheless made clear that whether the defendant "knew or should have known" of exculpatory information "will bear on whether there has been a *Brady* violation." *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (1995).[2]

In any event, this case would be an inappropriate vehicle for resolution of the conflict in authority that petitioners allege. Petitioners do not dispute that, in all circuits, no *Brady* violation occurs if the defendant has actual knowledge of the evidence allegedly withheld by the government. In this case, the district court found that petitioners "knew of Rothenberger's existence, his role at Adelphia, and the facts on which he could testi[fy]." Pet. App. 51a. Although petitioners challenge that finding as plainly erroneous, they do not dispute that they had "'firsthand knowledge of [Rothenberger's] role' in the 'underlying events.'" Pet. 24 (quoting Gov't 2008 C.A. Br. 122). They fail to explain how they could have been aware of Rothenberger's role in the underlying events and yet unaware of the testimony that Rothenberger could have provided based on that role. See Pet. 27 (suggesting that Rothenberger could have testified about his law firm's role in "review[ing] and approv[ing] the public disclosures regarding Adelphia's co-borrowed debt" and that "petitioners were not in-

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[2] As petitioners note (Pet. 18), the South Dakota Supreme Court has recited that "where [the defendant] was not aware of the evidence, if the evidence is both favorable and material, and he has made a request for the evidence, there has been a due process violation." *State* v. *Steele*, 510 N.W.2d 661, 665 (1994) (internal quotation marks and citation omitted). That court has also made clear, however, that "*Brady* requirements presuppose that the evidence in question is unknown to the defendant *or would remain unknown to him after exercising a reasonable diligent effort to discover*." *Erickson* v. *Weber*, 748 N.W.2d 739, 745 (S.D. 2008) (emphasis added).

volved in that process"). In any event, the case-specific question whether the district court plainly erred in determining that petitioners were aware of the facts as to which Rothenberger could testify does not implicate any legal issue of recurring significance that would warrant this Court's review.[3]

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[3] Petitioners contend (Pet. 19 & n.27) that the court of appeals' reliance on their knowledge of Rothenberger's identity and role conflicts with the decisions of the Ninth Circuit and various state courts. In the cases petitioners cite, however, the defendant did not have direct knowledge of the witness's involvement in the underlying events, and thus lacked knowledge of the facts as to which the witness could testify. See *Tennison*, 570 F.3d at 1091-1092 (defendants may have heard that the witness had information about shooting, but did not know the extent of what she had seen); *Wilson* v. *State*, 874 So. 2d 1131, 1133-1134, 1143 (Ala. Crim. App. 2002) (similar), rev'd on other grounds, 874 So. 2d 1145 (Ala. 2003); *Benn* v. *Lambert*, 283 F.3d 1040, 1062 (9th Cir.) (defendants knew of experts' existence, but did not know that the experts had conclusively made determinations that undermined the prosecution's theory), cert. denied, 537 U.S. 942 (2002); *Paradis* v. *Arave*, 130 F.3d 385, 392, 395 (9th Cir. 1997) (similar). In *Chauncey* v. *State*, 127 P.3d 18 (Wyo. 2006), the court concluded that the government had suppressed notes from an interview in which the witness, who had a personal relationship with the defendant and who was living with him, stated that she had not seen him selling drugs. The court did not address whether the defendant knew that the witness could so testify. See *id.* at 20, 24-26.

Petitioners also contend (Pet. 25 n.33) that, even if they "could have had some knowledge of the topics about which Rothenberger might testify," that knowledge was "effectively nullified" by the government's disclosure only that Rothenberger "might possess information about an immaterial 'timber rights transaction.'" Petitioners fail to explain how the government's identification of the only potentially exculpatory information of which it was aware "effectively nullified" their personal knowledge of Rothenberger's role in the underlying events and the matters as to which he could testify, and the lower courts' rejection of the argument does not merit further review. See Pet. App. 51a.

Moreover, petitioners' claim of entitlement to the interview notes under *Brady* fails because they cannot identify any material information those notes might plausibly contain. Notably, they filed their motion to compel discovery after their counsel, along with others, deposed Rothenberger in 2005 and 2006 in connection with a civil case. See Pet. App. 175a; Gov't 2008 C.A. Br. 114-115. Despite having full access to Rothenberger during that deposition, petitioners did not point to any particular aspect of Rothenberger's deposition testimony as sufficiently material to the criminal proceedings to warrant a new trial. Cf. Def. Br. in Supp. of Mot. for New Trial 37-38. It is implausible that Rothenberger's statements to the government in an interview several months earlier would have had any greater relevance to petitioners' guilt or innocence than statements given in response to direct questioning by petitioners' counsel.

Finally, despite petitioners' assertion that Rothenberger's post-trial deposition testimony "suggests that the witness statements suppressed by the Government contain exculpatory information," Pet. 27, the government reviewed the notes of the Rothenberger interview and identified no exculpatory material beyond the limited disclosure about the timber rights transaction, see Gov't 2008 C.A. Br. 122. Any allegedly exculpatory information that Rothenberger may have provided in response to later questioning, see Pet. 27, has little bearing on whether, at the time of trial, the government had additional information that necessitated disclosure under *Brady*.

2. Petitioners also contend (Pet. 20-21, 26) that the court of appeals erred in concluding that the government did not have an obligation under *Brady* to disclose

notes from SEC interviews with Rothenberger or other witnesses. That contention does not warrant this Court's review.

a. Noting that "there was no joint investigation with the SEC," the district court in this case concluded that "the United States Attorney's Office cannot be obligated to produce documents in the custody of the SEC." Pet. App. 52a. The court of appeals affirmed, explaining that "the District Court found that the United States Attorney's Office was not in possession of notes from SEC interviews with Rothenberger or other witnesses, and did not have an obligation to disclose what they did not possess." *Id.* at 32a.

b. Petitioners argue (Pet. 20, 26) that the court of appeals' focus on what the prosecutors possessed is inconsistent with this Court's instruction that the government has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. Petitioners are correct that the government has such an obligation, and the Second Circuit has so recognized. See *United States* v. *Gil*, 297 F.3d 93, 106-107 (2002) ("The government is reasonably expected to have possession of evidence in the hands of investigators, who are part of the 'prosecution team.'") (citing *Kyles*, 514 U.S. at 438-439). The decision below, which held that the government had no obligation to disclose the SEC's notes, given the relationship between the two agencies, is consistent with that principle.

c. Petitioners further argue (Pet. 20-21) that this Court's review is warranted to resolve a conflict of authority about when the prosecution is obligated to disclose exculpatory evidence in the sole possession of another agency. In particular, petitioners contend that the

Second Circuit's "focus on whether the agency or official in possession of the evidence was part of the 'prosecution team,'" Pet. 21, although consistent with the approaches of the Third and Eleventh Circuits, conflicts with the decisions of other courts of appeals that have stated that, "if a government agency is charged with the administration of a statute and has consulted with the prosecution in the case, the agency will be considered part of the prosecution, and its knowledge of *Brady* material will be imputed to the prosecution," *United States* v. *Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999)), cert. denied, 528 U.S. 1161 (2000); see *United States* v. *Wood*, 57 F.3d 733, 737 (9th Cir. 1995).[4] There is, however, no direct conflict. In both *Bhutani* and *Wood*, the court held that the Food and Drug Administration (FDA) was obligated to disclose information bearing on the safety and effectiveness of drugs the defendants had been charged with unlawfully manufacturing or dispensing. See *Bhutani*, 175 F.3d at 577; *Wood*, 57 F.3d at 735. The courts' decisions in those cases are not inconsistent with an approach that focuses on whether a governmental agency is part of the prosecution team. See *United States* v. *Pelullo*, 399 F.3d 197, 218 n.22 (3d Cir. 2005) (explaining that the courts in *Bhutani* and *Wood* both "found the FDA part of the prosecution team" based on

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[4] Petitioners (Pet. 20) also cite *United States* v. *Brooks*, 966 F.2d 1500 (D.C. Cir. 1992), as having articulated the same standard. In concluding that the U.S. Attorney's Office in the District of Columbia had a duty to search the files of the Metropolitan Police Department for exculpatory information, however, the court in *Brooks* cited "the close working relationship between the Washington metropolitan police and the U.S. Attorney for the District of Columbia (who prosecutes both federal and District crimes, in both the federal and Superior courts), a relationship obviously at work in this prosecution." *Id.* at 1503.

their involvement in the prosecutions), cert. denied, 546 U.S. 1137 (2006).

Petitioners err in contending (Pet. 20-21) that the decision below conflicts with *United States* v. *Reyes*, 577 F.3d 1069 (9th Cir. 2009), in which the court held that the prosecution was "charged with knowledge of [a] parallel SEC investigation." *Id.* at 1078. The court in *Reyes* emphasized that in that case, "the FBI, SEC, and U.S. Attorney's Office forged a strong, cooperative relationship in pursuing civil and criminal punishment" for the misconduct at issue in that case. *Ibid.* The court did not, as petitioners appear to suggest (Pet. 20-21) hold that the prosecution in securities fraud cases is always charged with knowledge of parallel SEC investigations, regardless of the working relationship between the two agencies.

In any event, as the government explained below, the government inquired of the SEC whether it possessed exculpatory information concerning Rothenberger and other witnesses, and is satisfied that the SEC does not possess such material. Gov't 2008 C.A. Br. 132. For that reason as well, further review is not warranted.

3. Finally, petitioners contend (Pet. 28-35) that the lower courts erred in computing the amount of loss attributable to their fraud for purposes of Section 2B1.1(b)(1) of the advisory Sentencing Guidelines. Petitioners' argument lacks merit and does not warrant this Court's review.

a. As the court of appeals noted, "[i]n calculating the amount of loss under the Guidelines, a sentencing court 'need only make a reasonable estimate of the loss'" caused by the defendant's fraud. Pet. App. 19a (quoting Guidelines § 2B1.1, comment. (n.3(C)). Here, the court noted, "on the day Adelphia's $2.2 billion in previously

unrecorded liabilities were disclosed, the company's stock price dropped 'about twenty-five percent to $20.39,' and * * * Adelphia filed for bankruptcy within months." *Id.* at 20a. The court noted that, "even if a loss of only $0.50 per share were attributable to [petitioners'] fraudulent conduct, that would still satisfy the $100 million threshold for the sentencing adjustment applied to the count." *Ibid.* The court accordingly "ha[d] no trouble affirming the District Court's estimate of loss caused by [petitioners'] fraud." *Ibid.*[5]

b. Petitioners contend (Pet. 31-33) that, regardless of the amount of loss to Adelphia's shareholders, "it is impossible to establish a causal link between petitioners' conduct" and those losses, Pet. 31, and that the courts below failed to consider expert testimony pointing to other loss factors. Petitioners' contention lacks merit. The courts below traced the loss to the disclosure of Adelphia's $2.2 billion in liabilities, which revealed that petitioners had, among other things, concealed from securities analysts and investors Adelphia's massive and growing debt and led the public to believe that securities purchases by the Rigas family had been paid for in cash. See Pet. App. 20a, *id.* at 43a-44a; Gov't 2008 C.A. Br. 56-67. The courts below reasonably concluded that, notwithstanding petitioners' efforts to point to other causal factors, the evidence presented at trial was sufficient to demonstrate by the preponderance of the evidence that petitioners' fraudulent conduct caused a loss greater

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[5] The court of appeals also noted that petitioners took more than $200 million from Adelphia's Cash Management System, Pet. App. 19a, a matter not explicitly raised in the district court's discussion of loss causation, see *id.* at 43a-45a. The court of appeals did not, however, rest its affirmance of the district court's loss determination solely on that ground. See *id.* at 19a-20a; cf. Pet. 33.

than $100 million. See Pet. App. 18a-20a, *id.* at 41-44a. In so concluding, the courts below considered petitioners' expert testimony pointing to other loss causation factors, but considered the testimony insufficient to undermine the conclusion that petitioners' fraud caused a loss of at least $100 million. See *id.* at 44a-45a ("[Petitioners] point to other loss factors * * * but the numbers here are of such scope * * * that the claim that there was not a reasonable calculation of a loss of at least $100 million borders on the frivolous, and is not made any less meritless because it is the subject of 'expert' analysis."). Those factbound determinations do not merit this Court's review.

c. Petitioners contend (Pet. 28-34) that this Court's review is warranted to resolve a conflict of authority about whether the loss-causation principles described in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), apply to criminal sentencing. This Court's review is not warranted.

In *Dura*, a civil securities fraud case, the Court held that plaintiffs suing defendants who manipulated the price of a stock could not satisfy the "loss causation" requirement of federal civil securities law by establishing that the stock's price was inflated because of the defendants' manipulations on the date that the plaintiffs purchased the stock. 544 U.S. at 340. The Court reasoned that, "as a matter of pure logic," the plaintiff has suffered no loss at the time of purchase because, at that moment, the price paid and the share bought possess equivalent value. *Id.* at 342. The Court observed that, at most, the higher purchase price might sometimes bring about a future loss, but that is "far from inevitably so." *Ibid.* The purchaser could sell the shares before the manipulation is discovered and suffer no loss at all.

Moreover, even if the later sale results in a loss, that loss could be due to factors other than manipulation. *Id.* at 342-343.

The Court in *Dura* had no occasion to construe Sentencing Guidelines § 2B1.1(b)(1). The court of appeals' application of Section 2B1.1(b) thus does not directly implicate this Court's decision in that case. Petitioners contend (Pet. 28-30), however, that the decision below conflicts with *United States* v. *Rutkoske*, 506 F.3d 170 (2d Cir. 2007), cert. denied, 553 U.S. 1060 (2008), and *United States* v. *Olis*, 429 F.3d 540 (5th Cir. 2005), which looked to the loss-causation principles articulated in *Dura* as the "the backdrop for criminal responsibility" and as "[u]seful guidance" for determining loss causation in the criminal context. *Olis*, 429 F.3d at 546; see *Rutkoske*, 506 F.3d at 179.

In both *Rutkoske* and *Olis*, the courts remanded for reconsideration of loss causation where the courts had failed to ensure that the loss resulted from the defendants' offense. See *Rutkoske*, 506 F.3d at 178-180 (noting that the district court had attributed the entire amount of the decline in stock value, through a date that "had no particular relevance to the offense conduct, and in fact was three months after the end of the charged conspiracy," to the defendant's offense conduct, without considering other factors that might have contributed to the decline); *Olis*, 429 F.3d at 548 (noting that "two-thirds of the drop in [stock] price occurred either before the revelation of [the fraudulent conduct] or more than a week after the announcement of the restatement of earnings caused by [the fraudulent conduct]," and thus, "a substantial portion of the entire loss * * * could not have been caused by [the fraudulent conduct]").

The court of appeals in this case, like the courts in *Rutkoske* and *Olis*, recognized that "'[t]he loss must be the result of the fraud,' as opposed to other, non-fraudulent occurrences." Pet. App. 19a (brackets in original; citation omitted). The court held, however, that, given the facts of this case, "regardless of the precise amount of the loss attributable to [petitioners'] fraud, that figure easily exceeds $100 million." *Ibid.* The court's case-specific determination does not warrant further review.[6]

In any event, this Court does not ordinarily review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991); see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue * * * to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). That practice is especially appropriate now that the Guidelines are advisory. See *id.* at 245.

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[6] Review would not be warranted in any event to address a purported intracircuit conflict with *Rutkoske*. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

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[*] The Acting Solicitor General is recused from this case.

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Supreme Court, U.S.
FILED
SEP 01 2010
OFFICE OF THE CLERK

No. 09-1456

IN THE
Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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September 1, 2010

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The lower courts are irreconcilably divided on the legal standards for evaluating suppression of evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and the applicability of the loss-causation principles in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), to sentencing enhancements. Those issues carry great practical significance for 85-year-old petitioner John J. Rigas, who faces the specter of serving the rest of his life in prison, and his son, petitioner Timothy J. Rigas, currently serving a 17-year sentence. The Government's response acknowledges that the circuits are divided on the important and recurring issues presented. The vehicle "problems" it raises, however, are insubstantial. This case offers an ideal opportunity for the Court to resolve conflicts in a case where such resolution meaningfully will affect the criminal liability and sentences of two successful businessmen.

ARGUMENT

I. THE COURT SHOULD REVIEW THE LEGAL STANDARDS FOR *BRADY* SUPPRESSION

The Government does not dispute that: the circuits disagree about the legal standards for suppression under *Brady*, *see* Opp. 9, 15; the standards applied by the Second Circuit conflict with this Court's decisions, *see* Pet. 22-24, 26; and the *Brady* questions presented by the petition are important and recurring, *see* Pet. 26-27. Instead, the Government opposes certiorari because the acknowledged "disagreement among the courts of appeals" supposedly is not sufficiently "direct," "sharply drawn," or of sufficient "degree" to warrant review, Opp. 9-10, 15, and because it perceives "vehicle" issues with the petition, Opp. 11. Those contentions are unpersuasive.

A. The Government Acknowledges The Circuit Conflict Regarding *Brady* Suppression

1. Scope of defendants' knowledge

a. State and federal courts are divided three ways regarding the scope of a defendant's knowledge that is necessary to excuse the Government's suppression of evidence. *See* Pet. 16-20. Some courts – like the Second Circuit here – apply a "knew or should have known" standard, *see* Pet. 16; some apply a "reasonable diligence" standard, *see* Pet. 16-17; and some apply a knowledge standard that best comports with this Court's decisions, *see* Pet. 18-20, 22-24.

The Government's opposition brief makes two critical concessions. *First*, it acknowledges the "disagreement among the courts of appeals" on whether prosecutors may suppress evidence about which a defendant "should have known." Opp. 9. *Second*, the Government does not contest that a "should have known" standard is inconsistent with this Court's precedents, which "'suggest[] a focus on actual knowledge.'" Pet. 22 (quoting *Boss v. Pierce*, 263 F.3d 734, 743 (7th Cir. 2001)).[1] Those concessions highlight the need for this Court's review.

b. The Government erroneously contends that the circuits' "disagreement" "is not as sharply drawn as petitioners suggest," and therefore not of sufficient "degree" to warrant review. Opp. 9-10.

The Ninth Circuit repeatedly has held that only a defendant's actual knowledge or awareness of exculpatory evidence justifies the Government's suppres-

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[1] Indeed, the Government does not dispute that a "should have known" standard is inconsistent with *Brady* and sound policy. Pet. 22-23.

sion of such evidence. *See* Pet. 18 (citing cases). Indeed, the Ninth Circuit has found *Brady* violations in numerous cases factually analogous to petitioners'. *See* Pet. 19 n.27 (citing *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1091 (9th Cir. 2008); *Benn v. Lambert*, 283 F.3d 1040, 1062 (9th Cir. 2002); *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997)).[2] The Government contends that, in those cases, "the defendant did not have direct knowledge of the witness's involvement in the underlying events, and thus lacked knowledge of the facts as to which the witness could testify." Opp. 12 n.3. But the same is true here. Although petitioners knew that Carl Rothenberger had given Adelphia legal advice, which they had followed, they lacked knowledge of the facts to which he would testify. *See infra* Part I.B; Pet. 24-25. And Rothenberger's repeated statements that he would not talk to petitioners' counsel prior to their criminal trials because he would invoke his Fifth Amendment rights conveyed precisely the *opposite* impression – that petitioners could *not* rely on what they knew of Rothenberger's role as legal counselor because he perceived himself to be in legal jeopardy. Accordingly, if petitioners had been prosecuted in the Ninth Circuit, the Government would not have been free to suppress the Rothenberger interview notes.[3]

The same is true of the D.C. and Tenth Circuits. *See Levin v. Katzenbach*, 363 F.2d 287, 291 (D.C. Cir.

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[2] State courts have done the same. *See* Pet. 19 n.27.

[3] In citing *United States v. Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009), the Government relies on what the Ninth Circuit itself referred to as "dictum." *Id.* at 1095. Moreover, the defendant in that case knew what the witness would say, because "both sides had access to [his] public testimony." *Id.* at 1096 n.3.

1966) (per curiam) (holding that breach of duty to disclose "may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own"). Indeed, the Tenth Circuit has held that "the fact that defense counsel 'knew or should have known' about [exculpatory] information . . . is irrelevant to whether the prosecution had an obligation to disclose." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) (also stating that what defendant "knew or should have known" will "bear on whether there has been a *Brady* violation"). And the Government does not dispute that the Tenth Circuit more recently has "applie[d] a knowledge standard for *Brady* suppression." Pet. 18 (citing *Scott v. Mullin*, 303 F.3d 1222, 1229-30 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.")).[4] Thus, the conflict with the judgment below is well developed and ripe for review.[5]

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[4] The South Dakota Supreme Court's divergent views on the question, *see* Opp. 11 n.2, confirm the lower courts' inconsistent approaches to determining when the Government may suppress evidence.

[5] The need for review is compounded by the additional conflict between the "should have known" and "reasonable diligence" standards in cases like this one involving witness statements. *See* Pet. 16-17. Unlike the "typical reasonable diligence case" involving a "document" – which is physical evidence that often can be discovered with some amount of diligence – "material contained in a witness's head" may be "nearly impossible for defense counsel to discover," no matter how diligent the effort or how friendly the witness. *Boss*, 263 F.3d at 740-41; *see also Strickler v. Greene*, 527 U.S. 263, 285 n.27 (1999) (excusing defense's failure to discover notes from witness "because she refused to speak with defense counsel before trial"). The "reasonable diligence" standard recognizes that distinction; not all

2. *Evidence possessed by another agency*

The circuits also diverge on whether prosecutors may suppress evidence in the sole possession of another agency. *See* Pet. 20-21. The Government does not dispute that "most circuits reject" the "possession" standard applied by the Second Circuit below. Pet. 20 (citing cases). Nor does the Government contest that the "possession" standard is inconsistent with this Court's precedents.[6] Instead, the Government asserts (at 15) that no "direct" conflict exists between circuits that apply the narrow "prosecution team" test and circuits that consider whether "'a government agency is charged with the administration of a statute and has *consulted* with the prosecution in the case.'" Pet. 20 (quoting *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (emphasis added)).

In fact, a direct conflict exists between the Seventh and Ninth Circuits' test, which imputes to the prosecution the knowledge of agencies with which prosecutors consulted, *see Bhutani*, 175 F.3d at 577; *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995),[7] and the "prosecution team" test, which (at least in some circuits) only imputes to the prosecution the

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courts applying the "should have known" standard do. *See* Pet. 17.

[6] Instead, the Government claims incorrectly that the decision below is consistent with *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), because the Second Circuit's judgment stemmed from "the relationship between the [U.S. Attorney's Office and the SEC]." Opp. 14. The Second Circuit's judgment rested solely on the fact that "the United States Attorney's Office was *not in possession* of notes from SEC interviews with Rothenberger or other witnesses, and *did not have an obligation to disclose what they did not possess*." Pet. App. 32a (emphases added).

[7] The Government incorrectly claims (at 15) that *Bhutani* and *Wood* applied the "prosecution team" test.

knowledge of those "over whom [the prosecutor] has authority," *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002). For example, in *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009), the Ninth Circuit held that the prosecution "is charged with knowledge of [a] parallel SEC investigation." *Id.* at 1078. By contrast, the Government admitted below that "the SEC conducted a parallel civil enforcement investigation," Gov't CA Br. 134 (Nov. 19, 2008), yet the Second Circuit found no duty to disclose. Moreover, the Government produced to petitioners, before trial, various materials from the SEC, including transcripts of sworn testimony from the SEC investigation of several Deloitte auditors. *See* Pet. 7. The prosecution's possession of such documents confirms that, as in *Reyes*, it had "forged a strong, cooperative relationship [with the SEC] in pursuing civil and criminal punishment." 577 F.3d at 1078.[8] Yet the Government continues to suppress potentially exculpatory material from the SEC investigation that it claims not to possess.

B. This Case Is A Good Vehicle For Deciding The Question Presented

The Government claims this case is a poor vehicle for addressing the question presented because: (1) petitioners supposedly knew to what matters Rothenberger could testify, (2) petitioners identify no

[8] *See also* SEC Press Release, "SEC and U.S. Attorney Settle Massive Financial Fraud Case Against Adelphia and Rigas Family for $715 Million" (Apr. 25, 2005) (announcing that SEC and U.S. Attorney's Office "reached an agreement to settle a civil enforcement action and resolve criminal charges against Adelphia Communications Corporation, its founder John J. Rigas, and his three sons"), *available at* http://www.sec.gov/news/press/2005-63.htm.

material information in the suppressed evidence, and (3) the Government does not consider the suppressed evidence exculpatory. Each argument fails.

First, nothing in the record supports the claim that petitioners "knew . . . the facts about which [Rothenberger] could testify." Pet. App. 31a; *see* Pet. 24-25. The district court, the Second Circuit, and the Government – despite having yet another opportunity to present such evidence – cite nothing. Moreover, the Government's claim that petitioners "do not dispute that they had firsthand knowledge of [Rothenberger's] role in the underlying events" (Opp. 11 (internal quotation marks omitted; alteration in original)) is off-point. Petitioners' knowledge of Rothenberger's "identity and 'role' as outside counsel to Adelphia" does not translate into knowledge of testimony that Rothenberger refused to reveal to petitioners while conveying his own perception of legal jeopardy. Pet. 24. Unlike the Government, which interviewed Rothenberger, petitioners had no way of knowing the crucial information in Rothenberger's head.[9]

Second, while faulting petitioners for not identifying exculpatory evidence in the Rothenberger notes – a burden no defendant can meet when, as here, those materials are suppressed – the Government refuses to permit even *in camera* review by a court. If the notes are as benign as the Government claims, then

[9] The Government seeks to evade review by suggesting (at 12) that the "case-specific" question whether a district court's plain error regarding petitioners' knowledge is not a "legal issue of recurring significance" warranting review. But the district court's plain error serves as the only basis for affirming the judgment below under the flawed and conflicting "should have known" standard. It would be manifestly unjust if courts could deepen circuit conflicts but evade review through plainly erroneous fact-findings.

the Government has no basis for suppression or denying *in camera* review.[10]

Third, the Government assures the Court that the prosecution and the SEC have reviewed the Rothenberger notes and SEC materials and found nothing exculpatory. *See* Opp. 13, 16. That argument strips *Brady* of any meaning; if the Government's say-so were enough, then *Brady* protections would be unnecessary. Moreover, if the SEC was as removed from the prosecution's investigation as the Government claims (at 14), then its reliability in recognizing exculpatory evidence is questionable.[11]

II. THE LOSS-CAUSATION ISSUE IN FEDERAL SENTENCING WARRANTS REVIEW

The lower courts vastly increased petitioners' sentences based on unfounded assumptions. Ignoring petitioners' unrebutted expert testimony, the courts below relied on "immediate press reaction" and the sheer "scope" of "the numbers" to assume causation and estimate the loss amount. *See* Pet. 29, 30-34.

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[10] Although Adelphia's *civil* counsel deposed Rothenberger more than a year after his government interview, those depositions focused on Adelphia's claims against Deloitte, not petitioners' *Brady* claims. Moreover, notwithstanding that Rothenberger's memory of the interviews undoubtedly had diminished in the interim, he recalled enough to suggest that the Government's pre-trial interview notes would have undermined the Government's criminal case or assisted petitioners during sentencing. *See* Pet. 9-10.

[11] Because the prosecution produced countless witness statements and SEC materials, the production of limited information from Rothenberger regarding the so called "timber rights transaction" led petitioners at that time to believe that the prosecution had no other potentially exculpatory Rothenberger evidence. *Compare* Pet. 25 n.33 *with* Opp. 12 n.3.

More is required for such dramatic sentencing enhancements.

The Government concedes the circuit conflict on how to evaluate causation under the U.S. Sentencing Guidelines without addressing the numerous flaws in the lower courts' causation analysis or the importance or recurring nature of this legal question. Instead, the Government unpersuasively (1) argues that the decision below is consistent with decisions from some other circuits, (2) attempts to prop up the Second Circuit's analysis, and (3) suggests that the U.S. Sentencing Commission (not this Court) should resolve the conflict.

A. The Government Acknowledges The Circuit Conflict In Applying *Dura Pharmaceuticals*' Causation Principles To Sentencing

A well-entrenched circuit split exists among the three largest circuits on whether *Dura*'s causation principles apply to loss causation in securities fraud cases. *See* Pet. 28-29. The Government does not dispute that the Fifth Circuit unequivocally applies *Dura*, the Ninth Circuit unequivocally rejects *Dura*, and the Second Circuit has waffled on whether *Dura* applies. *See* Pet. 29. Nor does the Government dispute that the Eighth and Tenth Circuits have split on the closely analogous question whether *Dura*'s causation principles apply to sentencing enhancements in insider-trading cases. *See* Pet. 30. Indeed, the Government does not even dispute that *Dura*'s causation principles *should* apply to sentence enhancements.

Instead, the Government incorrectly opposes review with the assertion that the decision below is consistent with *United States v. Rutkoske*, 506 F.3d

170 (2d Cir. 2007), and *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005). If the Second Circuit's analysis had followed *Rutkoske* or *Olis*, it could not have affirmed petitioners' sentences. Those cases applied *Dura*'s loss-causation principles and recognized the importance of expert testimony and accounting for other loss-causing factors. The Second Circuit here ignored the only expert testimony in the record and simply assumed that all Adelphia shareholder losses over a three-month period were attributable to unspecified offense conduct by petitioners. *Compare* Pet. 30-34 *and* Pet. App. 18a-20a, 44a-45a, *with Rutkoske*, 506 F.3d at 179-80 (remanding for re-sentencing because of district court failure to consider other factors in share price decline), *and Olis*, 429 F.3d at 547-49 (remanding for re-sentencing because district court refused to consider expert report identifying other factors for loss). Contrary to the Government's claim, the Second Circuit's analysis here cannot be reconciled with *Rutkoske* or *Olis*.

B. The Second Circuit Erroneously Enhanced Petitioners' Sentences

The Government gamely attempts to rehabilitate the lower courts' analysis of loss causation, which primarily relied on the "immediate press reaction" to Adelphia's March 27, 2002 disclosures. *See* Opp. 17-18; Pet. App. 44a. However, like the courts below, the Government ignores petitioners' arguments and does not address the missing causal link between specific offense conduct and loss, expert testimony regarding other loss-causing factors, and contrary "press reaction" that minimized the importance of the co-borrowing arrangements. *See* Pet. 30-34.

The Government generously characterizes the courts below as having "traced the loss" to petitioners'

fraud. Opp. 17. In reality, the lower courts did no such thing. Rather, they estimated a ball-park total loss for all Adelphia shareholders over a three-month period, presumed that petitioners must have caused at least $100 million of that loss,[12] and ignored contrary evidence. *See* Pet. 30-34. They gave no indication of having "*considered* petitioners' expert testimony," as the Government claims (at 18 (emphasis added)). The Second Circuit ignored petitioners' expert testimony altogether, and the district court did not address or respond to that testimony, but simply dismissed it as "frivolous" and "meritless." Pet. App. 44a-45a.

C. This Court Should Resolve The Conflict

Finally, the Government argues that, under *Braxton v. United States*, 500 U.S. 344 (1991), the U.S. Sentencing Commission, not this Court, should resolve causation issues under the Sentencing Guidelines. *See* Opp. 20. That request ignores the seismic shift in sentencing law that occurred after *Braxton* – namely, the now-advisory role of the Guidelines.

In *Braxton*, this Court declined to "resolve the . . . question presented" because the U.S. Sentencing Commission had "undertaken a proceeding that *will eliminate circuit conflict*" on the issue presented. 500 U.S. at 348-49 (emphasis added). Now that the Sentencing Guidelines are "effectively advisory," *United States v. Booker*, 543 U.S. 220, 245 (2005), and courts need give them only "respectful consideration," *Kimbrough v. United States*, 552 U.S. 85, 101 (2007), the Sentencing Commission lacks the power now to issue

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[12] For example, the Second Circuit simply assumed, without citing evidence, that petitioners were responsible for a loss of $0.50 per share. *See* Pet. App. 20a.

Guidelines revisions that can resolve circuit conflicts. The Sentencing Commission certainly cannot require district courts to evaluate evidence of loss, as the court below failed to do. Moreover, because the question here implicates the constitutional concern of sentencing enhancement without jury findings, the Sentencing Commission's guidance could not be definitive. *Cf. Booker*, 543 U.S. at 226.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1, 2010

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(3)

Supreme Court, U.S.
FILED
JUL 2 - 2010
CLERK

No. 09-1456

In the Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF CHARLES F. DOLAN, BARRY BABCOCK, ALAN GERRY, H.F. LENFEST AND ROBERT ROSENCRANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 2, 2010

WILSON EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Charles F. Dolan, Barry Babcock, Alan Gerry, H.F. "Gerry" Lenfest, and Robert Rosencrans ("*Amici*") are prominent American businessmen, all of whom founded cable television companies and grew them into successful businesses. Mr. Dolan is the founder of HBO and the founder and chairman of Cablevision Systems Corporation, the fifth largest cable provider in the United States. Mr. Rosencrans is the founder of U.A.–Columbia Cable and the founding Chairman of C-SPAN. Mr. Lenfest is the founder and former president and CEO of Suburban Cable, now part of Comcast. Mr. Gerry founded and was sole owner and chairman of Cablevision Industries, formerly the seventh largest cable provider in the United States. Mr. Babcock is the founder and chairman (retired) of Charter Communications.

Amici file this brief in support of this Court's grant of *certiorari* on the second question presented in the petition.[2] *Amici* file this brief to express the concerns

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[1] Pursuant to this Court's Rule 37.6, *Amici* affirm that no counsel for any party has authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *Amici* and their counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondent were notified of the intent to file this brief at least ten days prior to the filing of this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] *Amici* take no position with respect to the first question presented in the petition.

of American business leaders and corporate executives about the arbitrary nature of the loss enhancement used to impose the lengthy criminal sentences in this case. The courts below linked the loss enhancement vaguely to a decrease in stock price without requiring any proof that petitioners' conduct caused that decrease. Because *Amici* have extensive experience at the helm of the major cable corporations they founded, they are aware of the multitude of market factors unrelated to any misconduct that can influence the market price of a stock or other valuation of a company. *Amici* are thus well positioned to describe the problems caused by enhancing sentences based upon market factors over which the defendants have no control.

Amici agree that deterrence of white-collar crime is a value of vital importance, but believe that any such deterrent effect is eroded if white-collar sentences are arbitrary and disproportionate to the specific misconduct at issue. *Amici* believe that the business community will comprehend and respect federal white-collar criminal sentencing only if punishment is rationally related to the underlying illegality.

Amici file this brief in each of their personal capacities, and not on behalf of any of the companies with which they are now or were formerly associated.

INTRODUCTION

The Second Circuit's judgment allows a district court, in calculating the applicable range for a white-collar sentence under the U.S. Sentencing Guidelines, to ignore uncontroverted evidence that the criminal conduct at issue had no causal relationship to a proposed "loss" calculation. This reasoning effectively punishes defendants for market factors wholly unrelated

to the underlying criminal conduct. And because loss enhancement is the dominant factor enabling lengthy sentences for white-collar crimes, this reasoning allows the imposition of sentences that are not only arbitrary, but disproportionate.

The extreme length of petitioners' individual sentences here illustrates the point. U.S. Sentencing Guidelines § 2B1.1 requires a district court to make a "reasonable estimate of the loss" caused by the alleged misconduct "based on available information." Instead of doing so, the district court here picked an arbitrary number ($100 million) vaguely tied to a stock price decrease, with no analysis of whether or to what extent the alleged misconduct, rather than other unrelated factors, caused that price decrease. That arbitrarily chosen "loss" amount resulted in a *26 level enhancement*, increasing the applicable Guidelines range from 33-41 months (which petitioners have already served) to 15 years for John Rigas, now 85 years old, and 17 years for Timothy Rigas (leaving them still subject to 12- and 14-year sentences as adjusted).

These harsh sentences likely would have been avoided if the lower courts had followed, in the white-collar criminal context, the teachings of this Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). Just as stringent proof of loss causation is required in the civil context to discourage claims based on market factors unrelated to misconduct, so such proof is necessary in the white-collar criminal context to avoid disproportionate sentences that make white-collar punishment appear arbitrary to both the business community and the broader public. The Second Circuit thus erred in holding that the loss in this case "easily exceeds $100 million" without any ex-

planation of how this figure was derived or any acknowledgment that a publicly traded stock might vary in price for a multitude of reasons unrelated to an offense. The Court should grant review to clarify this important area of white-collar sentencing law.

SUMMARY OF ARGUMENT

Amici urge the Court to grant the petition to address and resolve the confusion surrounding the appropriate method of calculating loss under the Sentencing Guidelines in cases where the alleged conduct affects the stock price of a public company. The Second and Fifth Circuits have explicitly applied in the criminal sentencing context the loss calculation principles that this Court required in *Dura* in civil securities fraud cases. Yet the Ninth Circuit has explicitly declined to apply these principles in the criminal sentencing context, and in the present case, the Second Circuit backed away from its prior decision on this issue. The Eighth and Tenth Circuits have similarly split on the question of whether the *Dura* principles should apply to sentencing enhancements in insider trading cases.

This confusion among the lower courts creates a serious risk that white-collar defendants will face uneven and in some cases crushing sentencing exposure from loss enhancements that are based in part on legitimate conduct. This risk extends beyond petitioners to the general deterrent effect of white-collar criminal sanctions. If the perception of fairness in sentencing is lost because legitimate conduct is penalized and the vagaries of the stock market can translate to a lifetime in prison, the nation's business leaders will lose respect for, and cease to be properly guided by, the scheme of

white-collar criminal penalties that are designed to deter misconduct in the first place.

ARGUMENT

The court below affirmed that, in calculating a defendant's loss enhancement based upon an alleged effect on stock price, a district court is free to ignore uncontradicted evidence casting doubt on the causal relationship between the offense conduct and the decline in stock price. This judgment is inconsistent with both economic reality and this Court's *Dura* decision, which both the Second Circuit (in a prior case) and the Fifth and Tenth Circuits have held applicable to criminal cases.

In white-collar criminal cases, the Sentencing Guidelines place a dominant emphasis on the concept of loss. Accordingly, in cases where the illegal conduct relates to an alleged effect on the stock price of a large public company, the Guidelines can be interpreted to call for extremely high sentences. For these sentences to have appropriate deterrent effect, they must be perceived as rational, fair, and based on economic reality. Accordingly, it is crucial that district courts, when sentencing criminal defendants for misconduct that affected the stock price of a public company, determine which losses were caused by the offense conduct and which were caused by extraneous factors. The failure to recognize this economic reality not only leads to unfair and disproportionate sentences like the ones in this case, but also weakens the public's perception of fairness and rationality in criminal sentencing and diminishes the deterrent effect of white-collar criminal sanctions within the business community.

I. *CERTIORARI* SHOULD BE GRANTED TO CLARIFY THAT THE LOSS CAUSATION PRINCIPLES OF *DURA PHARMACEUTICALS* ARE APPLICABLE IN THE WHITE-COLLAR CRIMINAL SENTENCING CONTEXT

A. *Dura* Has Had Salutary Effects In Civil Securities Litigation

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court unanimously held that, when evaluating civil securities fraud allegations, courts must take into account "the tangle of factors" affecting stock price. *Id.* at 343. The *Dura* decision is based on the simple, unavoidable, economic reality that a publicly traded stock may vary in price for a multitude of reasons, including "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Id.*

Because a plaintiff in a civil securities fraud case is bound, like other plaintiffs, by the "traditional elements of causation and loss," *id.* at 346, this Court held the Ninth Circuit had erred in permitting a plaintiff's allegations to proceed despite the plaintiff's failure to distinguish between the alleged misconduct and other contributing factors to the price of a publicly traded stock. By requiring courts to consider the economic environment surrounding publicly traded stocks, the *Dura* decision sought to reduce abusive litigation and coercive settlements, while still ensuring that legitimate lawsuits could be pursued.

Although only a few years have passed, empirical evidence suggests that *Dura* has had precisely the intended effect. In the wake of *Dura*, "the number of

class action filings has declined, the average settlement amount has increased, and the number of lower and relatively quick settlements has declined." Scotland M. Duncan, Note, Dura's *Effect On Securities Class Actions*, 27 J.L. & Com. 137, 167 (2008). These results indicate that *Dura* has reduced the amount of frivolous class action securities litigation. *Id.*

B. *Dura* Likewise Should Apply To Loss Calculations In White-Collar Criminal Sentencing

Just as *Dura* applied economic reality to reduce the impact of frivolous civil securities litigation, so its principles should be applied to reduce the risk of grossly disproportionate sentences in white-collar criminal sentencing. As petitioners' case demonstrates, the need for stringent loss causation requirements may well be even greater in the criminal context, where an inattention to economic reality can translate into a lifetime in prison for an unlucky defendant.

Since the passage in 2001 of the "Economic Crime Package" amendments, the Sentencing Guidelines have prescribed extremely high sentences for high-level corporate officials. *See, e.g.*, Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 Fed. Sent'g Rep. 167, 167 (2008). The main reason for these high sentences is the Guidelines' use of enhancements based on economic loss, which in white-collar cases is "the single most important factor in the application of the Sentencing Guidelines." *See* Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757, 767 (2006). Critics have noted that this disproportionate focus on loss fails to distinguish "between more and less culpable defen-

dants and instead sweeps virtually any significant participant in a large corporate fraud into the same unrealistically punitive category." Bowman, *supra*, at 168.

The assignment of independent weight to the loss calculation constitutes a form of double-counting, because high loss amounts are frequently correlated with other sentencing enhancements, such as sophisticated means, multiple victims, and the number of participants. "[A]ny corporate officer found guilty of a large-loss corporate fraud is virtually certain to be subject to all of them." *Id.* at 170. Moreover, because a one-level increase at the top of the sentencing table results in a much larger change in the sentencing range than a one-level increase at the bottom of the sentencing table, the huge increases in offense level caused by large loss calculations create disproportionately large increases in applicable sentencing ranges. *Id.*

The Guidelines define "actual loss" as "the reasonably foreseeable pecuniary harm that *resulted* from the offense." 2001 U.S.S.G. § 2B1.1 cmt. n.2(A)(i) (emphasis added). In other words, loss is defined as the harm (and only the harm) that actually "resulted from the offense." In a case involving a publicly traded company, this critical driver of the defendant's sentence will often be based on an analysis of the company's stock price. If this analysis is done recklessly, without proper attention to which harms were actually caused by the illegal conduct, it can too easily result in a sentence of decades or even life imprisonment untethered to the underlying offense. Accordingly, if criminal sentences in white-collar cases are to be viewed as fair and proportionate, especially by the business community, it is crucial that this stock price analysis be seen as rational and as reflecting economic reality.

As the Fifth Circuit recognized in *United States v. Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005), and the Second Circuit recognized in *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007), a loss calculation involving publicly traded stock that does *not* attempt to distinguish between the effects of the alleged misconduct and the effects of general market conditions is inherently flawed and thus unreasonable.

In *Olis*, the defendant was a tax lawyer and accountant who participated in a scheme to artificially prop up a public company's cash flow. The defendant's sentence was enhanced by twenty-six levels solely because of the district court's loss calculation. While the Fifth Circuit recognized that the district court was required to make only a "reasonable estimate of loss," the Fifth Circuit noted that this standard did not justify *any* chosen method of calculating loss, but only those methods that are "legally acceptable." *Id.* at 545. After noting that "actual loss" under the Sentencing Guidelines incorporates both factual causation and legal (or proximate) causation, *see id.*, the Fifth Circuit found that *Dura* provided the necessary guidance for determining loss causation where the gravamen of the offense conduct is securities fraud because the civil damages measure "is attuned to stock market complexities." *Id.* at 546. The court noted numerous decisions recognizing that, "because a company's stock price is affected before and after the fraud by numerous extrinsic market influences as well as [by] other business decisions by the company, the calculation of loss attributable to securities fraud requires *careful analysis*," and emphasized the "importance of thorough analyses *grounded in economic reality*." *Id.* at 547 (emphasis added).

In *Rutkoske*, the defendant was charged with a scheme to artificially inflate the price of a publicly traded stock. In sentencing the defendant, the district court adopted a loss calculation method that failed to determine the extent to which the defendant's conduct, as opposed to market or other forces, caused shareholders' losses. 506 F.3d at 178. The Second Circuit found that this "basic failure at least to approximate the amount of the loss caused by the fraud, without even considering other factors," required a remand. *Id.* at 180. Noting with approval the Fifth Circuit's decision in *Olis*, which applied *Dura* principles to calculate the loss amount for a criminal sentence, the Second Circuit rejected the Government's contention that the principles set forth in *Dura* should not apply in a criminal case. The Second Circuit saw "no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence," holding that, "[n]ormally, expert opinion and some consideration of the market in general and relevant segments in particular will enable a sentencing judge to approximate the extent of loss caused by a defendant's fraud." *Id.* at 179-80.

Significantly, *Rutkoske* also held that the *Dura* principles should not be overlooked or ignored merely because the sentencing court is required to make only a "reasonable estimate" of loss. *Rutkoske* remanded the case for further fact-finding despite the Government's contention that the stock at issue traded in a "thin" market and that the price of the stock "plummeted" after the scheme "unraveled." *Id.* at 180. The Second Circuit held that, even if these facts tended to minimize the effect of market forces on the underlying stock

price, they did not preclude the effect of market forces, and so a *Dura* analysis was still required. *Id.* Moreover, *Rutkoske* recognized that an analysis of unrelated market forces should be undertaken even where the share price of a stock drops "so quickly and so extensively immediately upon disclosure of a fraud that the difference between pre- and post-disclosure share prices is a reasonable estimate of loss caused by the fraud," *id.* at 179, citing the example of a fraud disclosed just as the dot-com bubble burst which "might cause most, *but not necessarily all*, of the decline in previously high-flying technology stocks." *Id.* at 180 (emphasis added).

By contrast, the Ninth Circuit has rejected out of hand the applicability of the *Dura* principles to criminal sentencing. *See United States v. Berger*, 587 F.3d 1038, 1043 (9th Cir. 2009). Based on the mistaken notion that "[t]he *Dura Pharmaceuticals* Court's concern is not implicated in the criminal sentencing arena," *id.* at 1044, the Ninth Circuit interpreted *Dura* as applying solely to cases involving the fraud-induced overvaluation of stock, and held that, because the Sentencing Guidelines require a court to make only a "reasonable estimate of the loss," it is permissible for a court in a criminal sentencing case to ignore the *Dura* principles. Similarly, in the decision below, the Second Circuit ignored the *Dura* principles, noting that a sentencing court "need only make a reasonable estimate of the loss." 2001 U.S.S.G. § 2B1.1 cmt. n.3(C).

There thus exists an explicit conflict between *Berger*, which held the *Dura* principles inapplicable to the Guidelines because they require only a "reasonable estimate of the loss," and *Rutkoske*, which recognized that, where a court is engaged in the effort to make a

"reasonable estimate" of the loss, it must still consider external factors that may have affected stock price, *even if* those external factors may have had only a minimal effect. Under *Rutkoske*, relieving the district court of the need to calculate loss with total precision is not a license, as it is under *Berger*, for the court to ignore other events that may have contributed to the decline in a stock price.[3]

This Court issued its decision in *Dura* precisely because the Ninth Circuit had adopted a standard for civil securities fraud suits that would have permitted plaintiffs to recover under the securities laws even where the alleged misrepresentations had not proximately caused any economic loss to the plaintiff. *See Dura*, 544 U.S. at 346 ("[W]e find the Ninth Circuit's approach inconsistent with the law's requirement that a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss."). The same logic applies in white-collar criminal sentencing, with even more force. The Ninth Circuit's approach in *Berger*, like the Second Circuit's approach in this case, improperly permits a criminal sentence to be calculated based on

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[3] There is also an explicit conflict between the Eighth and Tenth Circuits as to whether the *Dura* principles should be applied to determine the gain earned by a defendant convicted of insider trading. In *United States v. Mooney*, 425 F.3d 1093, 1100 n.6 (8th Cir. 2005), the Eighth Circuit found the *Dura* principles incompatible with the Sentencing Guidelines. By contrast, in *United States v. Nacchio*, 573 F.3d 1062, 1077 (10th Cir. 2009), the court, citing *Olis*, *Rutkoske*, and the dissent in *Mooney*, applied *Dura* principles to avoid sentencing the defendant based on "unrelated gyrations of the market."

declines in stock prices that were not proven to have been caused, much less proximately caused, by the defendants' conduct. This Court should intervene to clarify that the *Dura* principles apply with equal force to the all-important loss factor in white-collar criminal sentencing.

The Sentencing Guidelines themselves support this view. The Ninth Circuit in *Berger*, like the Second Circuit in this case, focused on the phrase "a reasonable estimate of the loss" without considering the remainder of the Guidelines commentary. That commentary does not merely state that the court "need only make a reasonable estimate of the loss," but goes on to state explicitly that, when a court is making this reasonable estimate, "[t]he estimate of the loss *shall be based on available information*" 2001 U.S.S.G. § 2B1.1 cmt. n.2(C) (emphasis added).[4]

The Guidelines themselves thus align with the teaching of *Dura*: any *reasonable* calculation of loss based on stock price decline must take into account *all* of the reasons for that decline, and must disaggregate the reasons that are related and unrelated to the underlying offense conduct. In a case involving a publicly traded company, the "available information" necessarily includes "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events" that likely had an effect on the stock price but are unrelated to the alleged criminal conduct.

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[4] Similarly, in the 1995 Guidelines at issue in *Berger*, Comment 8 to Section 2F1.1 stated, "The court need only make a reasonable estimate of the loss, *given the available information*" (emphasis added).

It is undisputed that, in the instant case, the district court ignored all such "available information," including the undisputed testimony of defendants' expert, and chose instead to estimate the loss amount by reference to the "press reaction" to the disclosure of debt. *See* Pet. App. 44a. The district court made no effort to recognize "the tangle of factors affecting price" recognized in *Dura,* 544 U.S. at 343, and ignored the myriad of factors unrelated to the alleged misconduct that might have contributed to the decrease in the share price of the stock—including, for instance, the fact that the stocks of virtually all U.S. cable companies fell dramatically and precipitously during the first eight months of 2002, or that public questions concerning Adelphia's financial reporting were raised by its own auditors in Spring 2002.

The court of appeals, in affirming, stated that the loss figure "easily exceeds $100 million," Pet. App. 19a, without any explanation of how that figure was derived or why it is "easy" to do so. Similarly, the court of appeals observed that the district court reasoned that a loss of only $0.50 per share would satisfy the $100 million threshold for the sentencing adjustment applied to the count. *See* Pet. App. 20a. But *no one ever did the analysis* to demonstrate that even this $0.50 per share is an accurate figure in light of the numerous unrelated events occurring in the three months after the March 27 disclosures, including the cable industry's general market decline. The Rigases' prison sentences (in John's case, effectively a life sentence) should not be allowed to rest on a general market decline.

II. FAILURE TO APPLY THE *DURA* PRINCIPLES TO CRIMINAL SENTENCING CREATES A RISK OF PENALIZING LEGITIMATE BUSINESS CONDUCT

The significance of this case extends far beyond the injustice facing petitioners. Just as *Dura*'s stringent loss causation requirement was necessary to combat the potential for numerous frivolous lawsuits in the civil context, so *Dura*'s principles are necessary to prevent disproportionate and overbroad sentences in the criminal context.[5]

Federal criminal sentencing is supposed to be individualized. "[I]t is axiomatic that a critical objective of federal sentencing is the imposition of punishment on the defendant that reflects his or her culpability for the criminal offense (rather than for the unrelated gyrations of the market)." *Nacchio*, 573 F.3d at 1077. A sentencing court is supposed to craft a sentence that reflects a particular defendant's culpability. *See, e.g.*, 18 U.S.C. § 3553(a) (2010) (a sentencing court is obliged to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"); 2001 U.S.S.G. § 1B1.3(a)(3) (noting that re-

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[5] "Since the Sarbanes-Oxley Act of 2001, the Guidelines have recommended excessively high sentences for white-collar crimes. The recommended sentences for high-loss white-collar crimes eclipse the sentences typically imposed for murder and serial child molestation. In some cases, the recommendations are so high that they are 'literally off the chart.'" Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White Collar Criminal Cases*, 59 Duke L.J. 1001, 1021 (2010) (citations and alterations omitted).

levant conduct used to determine the Guidelines range includes "all harm that resulted from the acts and omissions" of the defendant and "all harm that was the object of such acts and omissions"). Uniformity in sentencing means not just similar sentences for violations of the same statute, but also "similar relationships between sentences and real conduct." *United States v. Booker*, 543 U.S. 220, 253-54 (2005).

These principles of individual responsibility require that criminal sentences be based on the harm actually caused by the offense conduct. If sentencing courts are not required to engage in "careful analysis" that is "grounded in economic reality," *Olis*, 429 F.3d at 547, they run the risk of penalizing legitimate conduct, and holding defendants responsible for market conditions beyond their, or anyone's, control. The danger is especially great in the case of public companies where even slight vagaries of the market can result in changes in market capitalization on the order of hundreds of millions, and even billions, of dollars. A defendant's sentence should not depend on whether a criminal investigation occurred during a financial crisis rather than a period of prosperity. *Cf. Nacchio*, 573 F.3d at 1083-84 (noting the potential for equally situated defendants to receive unequal sentences where a sentencing regime fails to account for unrelated market events); *Mooney*, 425 F.3d at 1107 (Bright, J., dissenting) (same).

Allowing prohibitively lengthy criminal sentences to be based in part on stock price movements unrelated to the offense conduct erodes respect for the fairness of the sentencing process, and therefore undermines the deterrent effect of the laws underlying those sentences. "[U]nwarranted disparity breeds disrespect for the law,

and it undermines public confidence in our system." *Hearing Before the Comm. on the Judiciary of the U.S. Senate on Guidelines Drafted by the U.S. Sentencing Commission*, 100th Cong., 1st Sess. 14 (1987) (statement of Judge Wilkins).

Moreover, penalizing defendants for losses bearing no proven relationship to their misconduct will chill legitimate and necessary business activity by the companies that are the foundation of our economy. *See, e.g.*, Kevin P. McCormick, *Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 Tul. L. Rev. 1145, 1175 (2008) ("If pure business decisions that bring no individual or personal gain to a corporate executive can translate to a lifetime in prison depending on the ensuing response by the stock market, executives might no longer have the desire to take many different types of perfectly legal actions that might benefit the company and the economy as a whole."); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783, 802 (2005) (noting that "overdeterrence occurs when people refrain from lawful conduct because they fear involvement with the criminal justice system"). Review by this Court in this case thus will help advance both the goals of fairness and of effective deterrence.

CONCLUSION

The petition for a writ of certiorari should be granted as to the second question.

Respectfully submitted,

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July 2, 2010

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Supreme Court, U.S.
FILED
JUL 2 - 2010
OFFICE OF THE CLERK

No. 09-1456

IN THE
Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAW PROFESSORS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 2, 2010

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose teaching and research interests include criminal law, criminal procedure, and sentencing law in the United States.

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL joins this brief because both questions presented are of significant interest to its members. As noted herein, a significant percentage of criminal sentences are informed and determined by loss calculations under the U.S. Sentencing Guidelines. Further, issues regarding the scope of the prosecution's obligation to produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), are of daily concern to our members practicing in the criminal courts. In light of conflict and confusion in the courts over both of these questions, this case is doubly deserving of review.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the Sandra Day O'Connor College of Law at Arizona State University, which paid for the printing of this brief, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

[2] A full list of *amici* law professors, who join this brief as individuals and not as representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

ARGUMENT

This case presents two questions for review: how to calculate economic loss under the U.S. Sentencing Guidelines, and the scope of prosecutors' disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Both are important issues warranting this Court's review.

I. THIS COURT SHOULD CLARIFY HOW TO CALCULATE ECONOMIC LOSS UNDER THE U.S. SENTENCING GUIDELINES

Although the U.S. Sentencing Guidelines are no longer mandatory, they continue to play a central role in federal sentencing. The Guidelines promote sentencing uniformity by serving as the starting point for all sentencing proceedings. Thus, it is crucial that this Court and other appellate courts continue to resolve legal uncertainty surrounding specific Guidelines. This is particularly so for § 2B1.1, the Guideline regarding the calculation of economic loss. That Guideline affects a large number of defendants, and it can result in significant sentencing increases. Disagreement in lower courts' application of the Guideline has resulted in disparate sentences. Accordingly, this Court should provide guidance regarding how to calculate loss under the Guideline.

A. It Is Imperative that the Court Continue To Address and Resolve Legal Disputes Regarding the Appropriate Application of the U.S. Sentencing Guidelines

Under 18 U.S.C. § 3553(a), sentencing courts must consider, among other things, the applicable sentencing guidelines. Although the U.S. Sentencing Guidelines were once mandatory, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory sentencing guidelines violated the Sixth Amend-

ment right to a jury trial. To remedy that constitutional violation, the Court excised the statutory provision making the Guidelines mandatory, thereby rendering the Guidelines "effectively advisory" for district courts. *Id.* at 245.

But, in doing so, the Court did not strip the Guidelines of importance. To the contrary, the Court retained a principal place for the Guidelines in federal sentencing, stating that district courts, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 264. The Court explained that maintaining the centrality of the Guidelines was critical to promoting the uniformity in sentencing desired by Congress. *Id.* at 250-56; *see also Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

Subsequent decisions by this Court have reaffirmed the continuing importance of the Guidelines. *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (noting that, after the excision of the mandatory provision in *Booker*, "the statute still requires a court to give respectful consideration to the Guidelines"); *Gall*, 552 U.S. at 50 n.6 (articulating "the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process"). In those decisions, the Court has made clear that the Guidelines should anchor sentencing decisions. Thus, it has held that, in imposing a sentence, district courts must first calculate the appropriate Guidelines sentence. *See Gall*, 552 U.S. at 49 (stating that "the Guidelines should be the starting point and the ini-

tial benchmark" at sentencing). And it has explained that, if a sentencing court fails to calculate the Guidelines range, or if the court improperly calculates the range, an appellate court should vacate that sentence and remand for resentencing. *See id.* at 51; *see also United States v. Todd*, 515 F.3d 1128 (10th Cir. 2008) (vacating and remanding sentence based on improper Guidelines calculation); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008) (vacating and remanding sentence based on improper Guidelines application). Indeed, in light of these decisions, lower courts have continued to treat the Guidelines as the most important consideration at sentencing, as is clear from the fact that most federal sentences continue to fall within the advisory Guidelines range, *see United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008) (noting that "most federal sentences fall within Guidelines ranges even after *Booker*").

Given that the reason for the centrality of the Guidelines is to promote uniformity in sentencing, it is critical that the Court provide guidance on the interpretation of those Guidelines. Uniformity in federal sentencing does not depend solely on whether district courts ultimately elect to sentence defendants within the Guidelines; it also depends on whether district courts initially are calculating Guidelines sentences in a consistent manner. Achieving consistency in sentencing is impossible if district courts apply different understandings of the Guidelines when imposing a sentence.

B. How To Calculate Economic Loss Under the Guidelines Is a Particularly Important Legal Question Requiring Prompt Resolution

Of the open legal questions regarding Guidelines calculations, the appropriate way of calculating economic loss under § 2B1.1 is one of the most important. That Guideline affects a large number of federal defendants, it can have a significant effect on the overall sentence a defendant receives, it requires complicated and sophisticated analysis, and it has resulted in conflict among the circuits.

The calculation of economic loss under § 2B1.1 affects a large number of defendants every year. In Fiscal Year 2009, 8,618 defendants were sentenced under § 2B1.1. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2009), *available at* http://www.ussc.gov/ANNRPT/2009/Table17.pdf. That is more than 10% of all defendants sentenced for the year, making it the third most applied Guideline.[3] And past years show similarly high numbers of federal defendants sentenced under § 2B1.1. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2008), *available at* http://www.ussc.gov/ANNRPT/2008/Table17.pdf (reporting 8,947 defendants were sentenced under § 2B1.1); U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2007), *available at* http://www.ussc.gov/ANNRPT/2007/Table17.pdf (reporting 8,777 defendants were

[3] Only § 2D1.1 (controlled substances) and § 2L1.1 (immigration offenses) were the subject of more sentences during that year. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2009), *available at* http://www.ussc.gov/ANNRPT/2009/Table17.pdf.

sentenced under § 2B1.1); U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2006), *available at* http://www.ussc.gov/ANNRPT/2006/Table17.pdf (reporting 8,322 defendants were sentenced under § 2B1.1).

The calculation of loss can have a drastic impact on the ultimate length of a defendant's sentence. *See* Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 767 (2006) ("While various modifications can have a small effect on the offense level for a defendant in a white collar crime case, the determination of loss can raise a sentence quickly from modest to substantial."). The sentencing court's determination of the amount of loss a defendant caused can result in an increase of up to 30 offense levels, *see* § 2B1.1(b)(1)(p), which may translate into more than 20 additional years of imprisonment, *see* Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1017-18 (2010).

The Sentencing Guidelines provide only limited guidance in how to calculate loss under § 2B1.1. *See* Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1628 (2007) ("Congress and the Sentencing Commission have been no help to courts faced with the task of determining loss in cases of financial reporting fraud."). The Guidelines and their commentary do not provide a definition of the term "loss," nor do they explore the causation issues implicit in the issue. Because of this lack of guidance, there has been much disagreement in particular cases about how to calculate loss. For example, in *United States v. Adelson*, 441 F. Supp. 2d

506, 509-10 (S.D.N.Y. 2006), the government contended that the defendant was responsible for $260 million in loss, the defendant argued that it was impossible to calculate the amount of loss for which the defendant was responsible, and the sentencing court ultimately concluded that the defendant was responsible for $59 million in loss. In *United States v. Ferguson*, 584 F. Supp. 2d 447, 449-50, 456 (D. Conn. 2008), the government contended that the defendants caused between $1.2 billion and $1.4 billion in loss, the defendants argued that the loss attributable to their actions was zero, and the sentencing court ultimately concluded that the defendants were responsible for a loss of between $544 million and $597 million. Such discrepancies are not solely the product of disagreements over the facts; rather, they also reflect disagreement about the proper method for calculating loss. *See id.* at 450-52. Other examples of such disagreement abound. *See, e.g.*, *United States v. Brown*, 338 F. Supp. 2d 552, 557-59 (M.D. Pa. 2004); *United States v. Bakhit*, 218 F. Supp. 2d 1232, 1236-42 (C.D. Cal. 2002).

How to calculate loss under the Guidelines — in particular whether to apply the analysis from *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which applies to civil cases — has caused conflict in the circuits. The Fifth Circuit has adopted the *Dura* analysis, *see United States v. Olis*, 429 F.3d 540 (5th Cir. 2005), while the Ninth Circuit has declined to adopt the analysis, *see United States v. Berger*, 587 F.3d 1038 (9th Cir. 2009); *see also United States v. Brown*, 595 F.3d 498, 527 n.32 (3d Cir. 2010) (noting the disagreement). The Second Circuit joined the Fifth Circuit in adopting the *Dura* analysis in *United States v. Rutkoske*, 506 F.3d 170 (2d Cir. 2007), but it

does not appear to have employed that analysis in the present case. Given the impact that loss calculation may have on sentences, resolving this disagreement is critical.

II. THE IMPORTANT AND RECURRENT *BRADY* ISSUES RAISED IN THE PETITION WARRANT THIS COURT'S REVIEW

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. This requirement is fundamental to our system of criminal justice. As the Court has explained, disclosing such evidence is necessary not only to satisfy the "rudimentary demands of justice" by ensuring the fairness of criminal trials, *id.* at 86, but also to promote the public's "trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,'" *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Highlighting the basic importance of this requirement is the fact that *Brady* issues arise in hundreds of cases each year. *See Recent Cases*, 123 HARV. L. REV. 1019, 1025 (2010).

Given the critical role of *Brady* in protecting due process rights, it is important that the Court provide guidance about *Brady*'s application. Inaccurate application of the doctrine may lead to prosecutors erroneously suppressing evidence. Conversely, it may also lead to courts erroneously overturning convictions based on evidence that prosecutors did not disclose. The importance of precisely defining the

contours of *Brady* is confirmed by the fact that this Court has issued numerous decisions on the scope of *Brady*. *See, e.g.*, *Kyles*, 514 U.S. at 439 (elucidating the government's disclosure obligations under *Brady*); *United States v. Bagley*, 473 U.S. 667 (1985) (extending *Brady* to impeachment evidence); *United States v. Agurs*, 427 U.S. 97 (1976) (outlining the prosecution's duty to disclose exculpatory documents not requested by the defendant); *Moore v. Illinois*, 408 U.S. 786 (1972) (defining the materiality requirement for disclosure).

A. This Court Should Clarify When a Defendant's Knowledge Excuses the Suppression of Evidence Under *Brady*

One particularly important issue regarding the scope of *Brady* involves the circumstances under which a defendant's knowledge about the potentially exculpatory nature of evidence suppressed by the government excuses what otherwise could be a *Brady* violation. *Brady* requires disclosure only of material evidence, that is, evidence whose disclosure would have had "a reasonable probability" of changing the outcome of the trial. *Kyles*, 514 U.S. at 433-34.

This Court has not addressed whether a defendant's knowledge of exculpatory evidence in the possession of the prosecutor justifies the government's suppression of that evidence under *Brady*. For their part, lower courts have concluded that evidence is not material when a defendant is actually aware of the exculpating facts established by the suppressed evidence, so long as the defendant could have introduced that exculpating evidence himself. *See* Pet. at 16-18. But they have disagreed whether a *Brady* violation occurs when the defendant "should" have been aware of the exculpatory evidence or could have

discovered the exculpatory evidence through "reasonable diligence." *Compare United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) ("[N]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence"), *and Ferguson v. Secretary for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009) (no *Brady* violation if defendant could have obtained evidence through "reasonable diligence"), *cert. denied*, No. 09-1186 (June 1, 2010), *with Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1091 (9th Cir. 2008) (rejecting a reasonable diligence rule).

Resolving this issue is critical, because it potentially impacts the government's disclosure obligation in many cases. There are many circumstances where the government possesses exculpatory evidence and the defendant should be aware of that evidence. Similarly, there are no doubt many cases where the defendant might be able to uncover exculpatory evidence with some amount of investigation. It is unclear how courts should evaluate the sufficiency of a defendant's efforts, particularly when they fail to uncover the evidence. Without guidance as to whether *Brady* violations occur in those circumstances, prosecutors cannot faithfully honor the due process rights of criminal defendants, and courts cannot consistently uphold them.

How these issues are resolved will also affect defendants' conduct. Defendants often rely on the government's obligation under *Brady* to disclose exculpatory evidence. If *Brady* does not apply when the defendant could have uncovered the exculpatory evidence on his own, defendants must conduct more extensive investigations either to discover the evidence themselves or to erase any doubt that they

could have discovered the evidence through reasonable efforts without the government's aid. Guidance is therefore necessary to inform defendants of the scope of their duty to obtain exculpating evidence.

Resolution of this issue is particularly important for white collar cases, like this one. Such cases often involve large amounts of evidence. Sifting through that evidence to ascertain whether any of it is exculpatory can take substantial time and resources. If defendants have the burden of doing so, they must plan ahead by allocating resources to conduct such investigations.

B. The Court Should Resolve Whether *Brady* Requires Disclosure of Evidence Possessed by Another Government Agency

The other *Brady* issue presented by the petition — whether *Brady*'s disclosure obligation extends to exculpatory evidence in the sole possession of another government agency — is also important.

This Court has made clear that the prosecutor's disclosure obligation under *Brady* extends beyond information in the actual possession of the prosecutor. *See Kyles*, 514 U.S. at 437 (stating that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). The Court has not, however, delineated the precise contours of that duty. In particular, it has not decided whether, or under what circumstances, the prosecutor must disclose evidence held by another government agency.

This issue is of significant importance. The federal government regularly pursues concurrent civil and criminal actions for unlawful conduct, especially for alleged violations of securities laws. *See, e.g.*, State-

ment of John Coffee before the Senate Judiciary Committee (Sept. 29, 2006), *available at* 2006 WLNR 16669716 ("[the Securities and Exchange Commission ("SEC")] and the Department of Justice frequently conduct parallel civil and criminal investigations"); *see also, e.g.*, *United States v. Kordel*, 397 U.S. 1, 7 (1970) (permitting prosecution based on evidence provided by parallel SEC investigation). Although related to the criminal proceeding, a civil suit is bound to uncover different evidence because it is conducted separately. That is especially so given the broad discovery rules in civil cases. *See* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 598 (1994) (detailing broader discovery in SEC investigations). When the government learns of potentially exculpatory evidence by taking advantage of broader civil discovery rules that a criminal defendant cannot employ, that raises an important question about whether the government has an obligation to disclose that evidence to the defense.

Resolving this issue is also necessary to give potential defendants adequate opportunity to gather exculpatory evidence. If disclosure is not required, defendants will have an incentive to seek evidence held by other government agencies investigating their conduct to determine if any of it is exculpatory, because they cannot rely on the prosecutor to provide any exculpatory evidence. Moreover, insofar as a defendant might bear the burden of conducting an investigation to determine whether the government possesses exculpatory evidence, whether evidence in the sole possession of another agency is covered by *Brady* will dictate the breadth of that investigation.

Accordingly, this Court should grant review to determine whether disclosure is required in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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July 1, 2010

APPENDIX

APPENDIX

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